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Supreme Court, U.S.
FILED

96 - 4 JUL 1 1996

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEBRA ROWINSKY, as next friend of
"JANE DOE" and "JANET DOE," her minor children,
and for all those similarly situated,

Petitioner

V.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

When a school district knows peer sexual harassment is so severe and pervasive on its campuses and school buses that it creates a hostile or harmful school atmosphere for young female students, but the district fails to take reasonable steps to prevent or curtail such sexual harassment, does the school district violate Title IX?

PARTIES TO THE PROCEEDINGS

The parties to this case are:

Petitioner: Debra Rowinsky, as next friend of "Jane Doe" and "Janet Doe," her minor children, and for all those similarly situated.

Respondent: Bryan Independent School District.

Counsel is unaware of any other person or entity with a financial interest in the outcome.

Counsel in this case are:

James C. Harrington and Peter Hofer of the Texas Civil Rights Project (Austin, Texas), for Debra Rowinsky, Petitioner.

Jennifer W. Jacobs and Lisa A. Brown of Bracewell & Patterson, L.L.P. (Houston, Texas), for Bryan Independent School District, Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

In the opinion below, the Court of Appeals for the Fifth Circuit held that Title IX generally imposes no duty on a school district to respond to sexual harassment committed by students, no matter how severe, widespread, or rampant the hostile environment it creates.

A school district, under the Fifth Circuit's logic, incurs liability only if its employees directly participate somehow in developing the hostile environment. Otherwise, the district is safe from liability, no matter how pervasive the harassment and no matter if the district is aware of the hostile environment but refuses to take remedial action.

This decision is in direct conflict with a recent decision of the Court of Appeals for the Eleventh Circuit, with the decisions of other Courts of Appeals, with various district courts, and with the official position of the United States Department of Education's Office for Civil Rights (OCR), the agency responsible for enforcing Title IX, which hold schools responsible for remedying peer sexual harassment of which they knew or should have known.

The decision below has national ramifications, not only because of its conflict with the Eleventh Circuit, but also because it requires OCR to apply different Title IX standards in different jurisdictions, a result clearly contrary to Congressional intent.

The Fifth Circuit decision is at great odds with Title IX's broad prohibition of sex discrimination in federally funded educational activities and programs. Title IX protects young women attending school in some parts of the country from humiliating peer harassment that threatens their ability to pursue an education and jeopardizes their school performance and personal well-being. Young women who attend school in the Fifth Circuit, however, now have no Title IX right to an education free from debilitating peer harassment and no recourse from oppressive sexual abuse perpetrated by their male counterparts.

This Court's judgment on the issue of peer sexual harassment in education is needed to resolve the conflicts among the courts of appeals and confusion in the district courts, to clarify the proper scope of Title IX for courts around the country, and to fulfill Congress's intent that women and girls have equal access to educational opportunity free of debilitating sex discrimination.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is to be reported at 80 F.3d 1066. The unpublished opinion of the United States District Court, Southern District of Texas (December 21, 1994) is in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was filed on April 2, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of Education Amendments of 1972
20 U.S.C. § 1681 et seq. and 34 C.F.R. §§ 106.8, 106.9
These provisions are in Appendix C.

STATEMENT OF THE CASE

Proceedings Below

In late 1993, Debra Rowinsky brought suit on behalf of her two daughters ("Jane" and "Janet Doe"), then in junior high school, and for the class of similarly situated young women, alleging that Bryan Independent School District (BISD) condoned and did not effectively curtail a persistent pattern of peer sexual harassment against girls on its school buses and its Sam Rayburn Middle School campus.[1]

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[1] Although Mrs. Rowinsky filed her case as a class action, and alleged facts supporting it, the trial court never reached this issue because it disposed of the case on summary judgment.

Mrs. Rowinsky sought declaratory and injunctive relief, as well as compensatory damages and attorney's fees, under Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681 et seq.).[2] The trial judge granted summary judgment against her under Rule of Civil Procedure 56(c).[3]

Statement of Facts

Because this case is before the Court on summary judgment, this Court takes all the facts alleged by Mrs. Rowinsky in the record as true and resolves all fact disputes and draws reasonable inferences in her favor.[4]

Mrs. Rowinsky alleged that, throughout the 1992-93 school year, a pervasive pattern of hostile environment sexual harassment existed at BISD that adversely affected her daughters and many other young female students. BISD knew of this nine-month-long pattern of harassment, but refused to effectively curtail the degrading behavior. As a result, Mrs. Rowinsky's daughters suffered in their ability to concentrate on school work and in their emotional and psychological well-being, and were denied their right to attend school in a non-discriminatory environment.

Throughout the year, Mrs. Rowinsky, her daughters, and others repeatedly, but unsuccessfully, complained to

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[2] Briefly, Title IX requires a school district receiving federal funds enact and enforce certain procedures designed to limit discrimination in its educational programs. BISD is a recipient of such federal financial assistance.

[3] Mrs. Rowinsky raised other legal claims as well. She appealed only from summary judgment on the Title IX claim, unsuccessfully, and seeks a writ of certiorari on that point alone.

[4] The appellate decision omitted a great many facts alleged by Mrs. Rowinsky to show the persistent hostile environment sexual harassment, including the extensive number of complaints BISD had received and the experiences of Student J.S.. Those are included in this petition.

BISD officials about the widespread sexual harassment. R.Vol.7 at 1367 ¶¶4,6; 1365 ¶11; 1361 ¶4; 1361-60 ¶¶5,7; 1355 ¶4; 1354 ¶¶7,10; 1352 ¶15; 1351 ¶19; 1350 ¶¶23,25.[5] BISD's refusal to take action to end the sexual harassment caused a hostile environment to exist during the entire year.[6]

Beginning in September 1992, Jane and Janet, both eighth graders, were subjected to persistent degrading physical and verbal sexual assaults on a BISD school bus. Id. at 1367 ¶2; 1361 ¶3. A male student, G.S., abused Janet, physically and verbally. He regularly swatted her bottom whenever she walked down the aisle of the school bus and made ridiculing and debasing comments, such as, "When are you going to let me fuck you?", "What bra size are you wearing?", and "What size panties are you wearing?" He also called her a "whore." As time went on, his harassment became more abusive; he even groped her genital area, which humiliated Janet. R.Vol.7 at 1361 ¶3.

During the first few weeks of the school year, Janet complained to Bob Owens, her bus driver, no fewer than eight times about G.S.'s physical and verbal abuse. Id. at 1361 ¶4. However, Owens never took any action. His inaction discouraged Janet; she stopped reporting the incidents to him, and the harassment continued. Id. at 1360 ¶6. Mrs. Rowinsky also complained to Owens about the sexual assaults on her daughters and other girls on the bus; but he ignored her, too. Id. at 1355 ¶4.

Owens was fully aware of the sexual harassment on

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[5] Because the mandate has yet to issue in the Court of Appeals, the clerk could not release the record to Petitioner, making it impossible for her to expand on or amplify the record citation.

[6] The hostile environment sexual harassment actually continued well beyond the 1992-93 school year, as demonstrated by the unfortunate experiences of Student J.S., described below.

his bus. During an investigation a year later by the U.S. Department of Education's Office for Civil Rights (OCR), Owens admitted he regularly heard students on the bus use degrading language, such as "bitch" and "whore," but ignored it because it was a "common way of life for the students." Moreover, Owens acknowledged to OCR that students had reported to him incidents of abusive sexual contact. He conceded "there could have been a pattern of sexual nature type offenses within his bus." R.Vol.7 at 1323.

As a result of Owens' refusal to correct the sexual harassment on the bus, G.S. escalated his abusive behavior. On September 24, he sexually assaulted Jane; he forcibly grabbed and squeezed her genital area. She pushed him away and tried to get away from him, but he followed and grabbed her breasts. The assault traumatized Jane, and she arrived home very upset and shaking.

This latest attack and lack of response to prior numerous complaints angered Jane and Janet's parents. They went with their daughters the next day to complain to Assistant Principal Randy Caperton at Sam Rayburn School. Caperton told the Rowinsky family he had heard about the sexual assault and believed the attack merited expelling G.S. Id. at 1367 ¶¶5,6; 1361-60 ¶5; 1355 ¶5; 1354 ¶¶7,8.[7]

On September 29, Mrs. Rowinsky again visited Caperton about the sexual harassment. He showed her a shoddily written report on the incident with G.S. The report did not even name G.S. as the assailant and contained various discrepancies, such as an incorrect date of the incident. Mrs. Rowinsky told Caperton, as she had told Owens, that other girls on the bus also were suffering sexual harassment, and identified four by name. Id. at 1354-53 ¶10; 1331.

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[7] After the meeting with Caperton, Jane and her parents filed sexual assault charges against G.S. with the city police.

G.S.'s only punishment for sexually assaulting Jane was a three-day suspension from the bus. On his return, G.S. was to sit in the second row, behind Owens. BISD never punished him for molesting Janet. Id. at 1349 ¶27.

When G.S. resumed riding the bus, he was undeterred and continued his sexually assaultive behavior. With Owens nearby, G.S. directed abusive and humiliating words toward Jane and Janet, like "whore," "bitch," and "trick," and slapped Janet on her bottom. Id. at 1366 ¶9; 1360 ¶6.

BISD authorities did not enforce G.S.'s seat assignment; he sat wherever he pleased with impunity and continued his disgusting sexual harassment. Id. at 1367-66 ¶6; 1366 ¶10; 1360 ¶¶6-8,10. BISD's lack of attention to their earlier complaints sufficiently discouraged Jane and Janet that they did not report G.S.'s continued assaults; they felt BISD authorities would not do anything. Id. at 1366 ¶10. Mrs. Rowinsky, however, called Jay Anding, Assistant Director of the BISD Transportation Office, and demanded that he restrict G.S.'s seating on the bus because of his persistent sexual assaults. Mrs. Rowinsky's call produced no results.

On December 16, another male student (L.H.) sexually assaulted Jane and Janet. On the morning bus ride, he pushed his hand up under Janet's skirt and shouted, "I almost got pussy!" Janet, frightened and humiliated, resisted and hit him to make him stop; but L.H. forced his hand up her skirt and grabbed her genital area. Janet went to Owens as soon as the bus stopped at a red light and complained; but he ignored her and refused to respond. On the afternoon bus ride, L.H. this time pushed his hand up Jane's skirt and grabbed her genital area. Jane was so humiliated and frightened that she did not complain to Owens, and even waited until the following day before telling her mother. Id. at 1365 ¶¶7,11-12; 1360.

Mrs. Rowinsky again contacted Anding, this time to complain about L.H.'s sexual assaults. She also informed

him that other girls were being sexually molested and gave him their names, as she had done with Caperton on September 29, and with Owens prior to that. Anding said he would investigate that very day, but he never contacted Mrs. Rowinsky again. Id. at 1352 ¶¶15,17.

In early January 1993, Mrs. Rowinsky contacted Caperton to learn the results of the investigation. He admitted Anding had not conducted the investigation and said that, for punishment, L.H. was suspended for just three days for assaulting Jane. L.H. never received any discipline for assaulting Janet. Id. at 1352-51 ¶18; 1349 ¶27.

The next day, Mrs. Rowinsky contacted Dr. Tom Purifoy, Director of Secondary Education (and, unbeknownst to Mrs. Rowinsky, BISD's Title IX coordinator). She described the degrading physical and verbal sexual assaults. Despite being Title IX coordinator, Purifoy did not inform Mrs. Rowinsky about Title IX, as required by law, and did not conduct an investigation or take remedial action to end the hostile environment sexual harassment. Id. at 1351 ¶19.

All these complaints notwithstanding, a new bus driver, who had taken Owens' place, rather incredibly assigned Jane to the seat right next to G.S. Jane feared G.S. would attack her again. Accordingly, Mrs. Rowinsky removed her daughters from the bus until BISD could ensure a safe atmosphere for them. Id. at 1365 ¶13; 1351 ¶21; 1321.

Mrs. Rowinsky then went to Dr. Purifoy and requested that he remove G.S. from the bus. Purifoy refused to take any action without "proof" of the assaults and declined to accept anything from the transportation office as the "proof" he required. Id. at 1351-50 ¶22.

On March 30, Mrs. Rowinsky met with Dr. Sarah Ashburn, BISD Superintendent, to complain about G.S.'s sexual assaults. Ashburn said the three-day bus suspension was sufficient punishment and refused to take further action.

Ashburn did not inform Mrs. Rowinsky about Title IX or its grievance procedures.[8] Id. at 1350 ¶23.

The ongoing hostile environment also manifested itself in sexual harassment in the classroom. That same day, during class, a male student, F.F., reached up under Janet's shirt and quickly unfastened her bra. As discipline, Vice Principal Petty sent F.F. home for the rest of that day and the next (id. at 1360 ¶8), a rather mild form of punishment, if any at all.

The following day, Mrs. Rowinsky visited Petty and complained about the assault perpetrated by F.F. Petty did not consider his conduct to be sexual: "it sounded like something my husband or yours might do." For Mrs. Rowinsky, this comment showed ignorance in dealing with sexual harassment for young girls. Id. at 1350 ¶25.

Mrs. Rowinsky again met with Ashburn and protested the failure to take action against G.S. and L.H. Ashburn did not consider what had happened to Jane and Janet to be assaults and refused further action. Id. at 1349 ¶28.

Because every BISD official she contacted repeatedly refused to take action to end the sexual assaults and harassment and because Jane and Janet feared for their safety, Mrs. Rowinsky felt compelled to transfer her daughters out of BISD. Id. at 1365 ¶14; 1359 ¶9; 1349 ¶29.

During the nine long months Jane and Janet endured this gauntlet of humiliating and degrading harassment, BISD was made aware of at least 253 other sexual related com-

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[8] No BISD official informed Mrs. Rowinsky or her daughters about Title IX's prohibition on sex discrimination or advised them of any Title IX grievance procedures. R.Vol.7 at 1354 ¶¶7,19,22,23,28. Mrs. Rowinsky, without any help from BISD, eventually filed a complaint, on May 11, 1993, with the Office for Civil Rights of the U.S. Department of Education (id. at 1345). Mrs. Rowinsky learned about Title IX through a television program, "Street Stories."

plaints involving students -- 76 at Sam Rayburn School alone. Id. at 1317-15. Such a substantial number of incidents should have sounded a clear warning bell that something was gravely wrong at BISD.

Sexual harassment became an accepted norm at BISD; it affected other young women who walked its hallways and rode its buses. For example, another BISD middle school student ("Student J.S.") suffered from the same hostile sexual environment that permeated Sam Rayburn School, which, except for ten weeks, she attended from August 1992 to December 1993.[9]

During September 1992, a group of male students on her bus began a vicious, relentless campaign of molesting Student J.S. Daily, they would pinch and slap her breasts, thighs, and buttocks, leaving bruises on her body. They verbally abused her with names like "whore," "white bitch," "white ho," and "boots and boobs." Id. at 1301 ¶2; 1300 ¶3; 1289 ¶4; 1283 ¶4. The assaults continued as long as Student J.S. attended school that year.

As happened with Jane and Janet, Student J.S. lodged complaints with BISD administrators, teachers, and transportation officials, all of which went unaddressed. She complained during the same time period that BISD officials were receiving complaints from Jane, Janet, and Mrs. Rowinsky. Id. at 1300 ¶¶4-10,12,19,32,33,36; 1367 ¶¶3-6,11.

BISD officials never investigated a single one of J.S.'s numerous complaints or advised her about Title IX. In fact, on several occasions, reflecting their arcane and chauvinist

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[9] Student J.S. is currently involved in litigation similar to this. J.W., as next friend of her minor daughter v. Bryan Indep. School Dist., No. 95-20643 CIVIL (5th Cir.). The trial court also dismissed her case; it is now pending in the Court of Appeals, although, in light of Rowinsky, its fate is fairly easy to discern.

view of blaming the victim, the officials faulted Student J.S.'s attire or her behavior for the steady stream of verbal and physical sexual assaults she endured. Id. at 1300-1299 ¶9; 1294 ¶36; 1279 ¶5. They refused to discipline her assailants.

During the 1992-93 school year, J.S. lodged at least twenty complaints with her bus driver. She regularly named several male students on the bus. Other female students on the bus witnessed these same incidents. Id. at 1300 ¶4; 1290-89 ¶¶3,4; 1283 ¶¶3,5.

In September 1992, Assistant Principal Caperton contributed directly to the hostile environment by verbally abusing Student J.S. and her friends. When a group of nine female students, including Student J.S., passed Caperton in the hallway, he stopped them and told them they "looked like a bunch of little 'ho's' [slang for whore]...." Id. at 1299 ¶11; 1288 ¶10; 1283 ¶6.[10]

In October, a student, "O.W.," threatened to "fucking kill" Student J.S. for reporting an assault on the bus. He repeated his threat in front of Principal Harrison Crenshaw. Crenshaw gave O.W. a one-day suspension for using offensive language in front of him, but totally ignored the sexual misconduct on the bus or the threat. Id. at 1298-97 ¶15.

Because of the on-going sexual assaults, Student J.S. had to take prescribed anti-depressants for insomnia, anxiety, and depression. In November and December, she attended school in Louisiana and Wichita Falls, Texas, for health and safety reasons. She re-enrolled at Sam Rayburn in January 1993. Id. at 1297 ¶21; 1296 ¶¶22,23; 1277-76 ¶10; 1276 ¶¶12,14, 15. Her depression worsened, and she was admitted to a mental health center for three weeks, after which she

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[10] The Fifth Circuit ignored this important allegation. However, it shows the contributing role BISD administrators played in the development of the hostile atmosphere of sexual harassment.

returned to school. Id. at 1296 ¶28; 1276 ¶18; 1275 ¶20.

In March 1993, O.W. and a group of male students assaulted Student J.S. in the school hallway, grabbing her breasts and genital area. In self-defense, she kneed O.W. in the groin. The other male students taunted her with names. Principal Crenshaw, who witnessed this incident, disciplined Student J.S. with a three day in-school suspension, but did not punish any of the boys. Id. at 1276 ¶¶21-22.

In April, a school counselor suggested that Student J.S. enter the special education program because of her declining grades and on-going harassment from O.W. and his friends. Id. at 1294 ¶¶34,35; 1274 ¶25. This approach again reflected BISD's practice of blaming the victim, and not the perpetrator. Student J.S. eventually left Sam Rayburn and was schooled at home. Id. at 1293 ¶¶41-42; 1273 ¶30.

BISD's capricious handling of Jane's and Janet's sexual harassment complaints, and those of Student J.S., demonstrates BISD did not have any policy concerning sexual harassment or, if it had one, it was not following it. Id. at 1135-25. Further, BISD did not train its employees about how to respond to sexual harassment of students, despite the hostile environment poisoning Sam Rayburn School.

One reason BISD's hostile environment thrived was because of inadequate discipline for sexual assaults and harassment. The BISD Discipline Management Plan requires expulsion of a student who assaults a teacher or other individual, or assignment to Special Opportunity School Placement (id. at 1123-18). However, as this case demonstrates, BISD has a custom or policy of treating sexual assault as a less serious offense than other assaultive behavior.

During school years 1992-1994, 112 incidents of fighting occurred at Sam Rayburn. BISD applied discipline consistently in those cases: 108 incidents resulted in suspensions from 1/2 days to 6 days. There were also three

expulsions and one in-school suspension. In contrast, BISD imposed mild punishment, or none at all, for sexual misconduct. For 122 sexually related incidents, there were only five suspensions, and no expulsions. Id. at 1267-1137, 1116-04.[11]

An OCR investigation in 1993 corroborated the sad state of affairs at BISD during the period when Jane, Janet, J.S., and other girls suffered sexual harassment and Mrs. Rowinsky tried to protect them by appealing to BISD authorities. OCR investigated whether BISD had failed to take appropriate action when it became aware female students were subjected to sexual harassment. Id. at 1346-03; 998-93. Students, school employees, and parents informed OCR they had witnessed numerous sexually related offenses on school buses, in classrooms, in hallways, and on school grounds during the 1992-93 school year. These were "a common occurrence throughout the district."[12] Id. at 1325, 1318.

OCR's 43-page report recorded 254 sexual misconduct incidents during the 1992-93 school year alone and found that, "due to the persistent and overt nature of the incidents ... BISD had sufficient notice to conclude that a sexually

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[11] The point of these statistics is not to raise the issue that boys and girls might suffer differential discipline, as the Court of Appeals seemed to suggest, but to show BISD's startling lack of resolve to curtail evident, pervasive sexual harassment.

[12] OCR interviews with male and female students who rode on Jane and Janet's bus during the 1992-93 school year corroborated that G.S., L.H., and other male students engaged in patently offensive conduct throughout the year. The OCR report revealed the following daily occurrences on the bus: (1) male students would call girls "bitch," "whore," "trick," and "slut"; (2) obscene sexual language would be used, such as "I want some pussy," "when and where do you want it," "you got big tits," "I have f____d her"; and (3) male students would touch girls on their legs, genital area, posterior, and breast. R.Vol.7 at 1324.

hostile environment had developed." Id. at 1307, 1309.[13]

OCR further "determined that BISD's sanctions [for sexual assault] were not calculated to end the sexually hostile environment or ... prevent future acts of sexual harassment...." OCR "concluded that [BISD] failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services," in violation of Title IX. Id. at 1307.

BISD totally ignored Title IX regulations; it did not adopt and publish grievance procedures for student complaints alleging acts prohibited by Title IX.[14] It did not publish a notice of a non-discrimination policy in local newspapers to the effect that BISD may not discriminate on the basis of sex in its educational programs or activities. Id. at 915.[15] During the 1992-93 school year, BISD did not distribute any written nondiscrimination policy to students.[16] Nor did the 1992-93 Student/Parent Handbook or the 1992-93 Discipline Management Plan list a Title IX coordinator, with the requisite name, address, telephone number, and statutory duties.

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[13] OCR reported that 162 (or 63.7%) of these incidents occurred at the middle school level, providing a strong signal to BISD that a serious and pervasive sexual hostile environment had developed and that the district should take effective remedial steps. Id.

[14] 34 C.F.R. § 106.8(b). Neither the 1992-93 nor 1993-94 Student/Parent Handbook had any grievance procedure for Title IX complaints. BISD incorrectly relies on a generic complaint procedure to satisfy its Title IX obligations. The procedure provides no notice of mechanisms for complaints as to BISD's non-compliance with Title IX and lists no actions prohibited by Title IX. R.Vol. 7 at 911-857.

[15] 34 C.F.R. §106.9 requires a recipient of federal aid, like BISD, to publish its non-discrimination policy in local newspapers.

[16] Id. §106.8(a)

This case is not a situation in which a few isolated incidents of sexual harassment occurred; far from it. Rather, BISD, repeatedly put on notice about the widespread oppressive sexual intimidation and assaults lurking throughout its system, showed the most callous lack of concern possible for the young women in its charge.

Congress, through the exercise of financial largesse, sought to prevent, and effectively remedy, this sort of sexual discrimination.[17] This case therefore must provide a remedy for BISD's cold and calculated disregard of young female students subjected daily to verbal and physical assaults. Justice has yet to be served in the school buses and classroom corridors of BISD.

This Court should grant the writ of certiorari, reverse the Court of Appeals, and find that such a cause of action exists. This will allow Mrs. Rowinsky her day in court to try to hold Bryan ISD liable for the hostile environment it allowed to exist, even fester, which adversely affected young women in its schools in violation of Title IX.

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[17] Sexual harassment affects millions of young women in the nation's schools, robbing them of an equal education and of their self esteem. One recent survey of 1600 public school students, which Ms. Rowinsky entered into the trial court record, found that 85% of female students experienced some form of sexual harassment during their school lives; and 80% of sexual harassment is inflicted by peers. See "Hostile Hallways: AAUW Study on Sexual Harassment in America's Schools," American Ass'n of University Women Educational Foundation. Harris Scholastic Research (June 1993), pp. 22-24.

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the serious decisional conflicts among the courts of appeals and district courts as to whether Title IX applies to peer hostile environment sexual harassment in elementary and secondary schools.

The lower courts have sought to interpret this Court's few decisions under Title IX and apply them to claims of hostile environment sexual harassment in schools. The results have been mixed, although the trend seemed to be moving in the direction recently recognized by the Eleventh Circuit. This case from the Fifth Circuit exacerbates the decisional confusion, which, in turn, undermines nationwide uniform application of Title IX and throws OCR's administration of the statute into chaos, effectively causing the enforcement of different Title IX standards in different jurisdictions.

a. This Court has recognized that sexual harassment which creates a hostile environment falls within Title IX prohibitions.

Rowinsky conflicts with, and weakens, prior opinions of this Court which recognize that sexual harassment in schools violates Title IX -- without the need to show school district policy.

This Court has acknowledged the expansiveness of Title IX's prohibitions against sex discrimination in schools, according Title IX "a sweep as broad as its language."[18] In Cannon v. University of Chicago,[19] the Court found a private right of action to be consistent with the goals of Congress in enacting Title IX.

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[18] North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

[19] 441 U.S. 677, 704 n.36 (1979).

In Franklin v. Gwinnett County Public Schools,[20] the Court applied Cannon and recognized an action for students subjected to hostile environment sexual harassment. Franklin involved a teacher who sexually abused and assaulted a student; it was not "quid pro quo" harassment because he did not link his misconduct to an educational opportunity or benefit.

Franklin held that Title IX requires schools to stop sexual harassment of students by teachers in order to ensure that students are educated in a harassment free environment. Hostile environment harassment is a prohibited form of sex discrimination in schools.[21]

The school's "duty not to discriminate" rests, in part, on its ultimate authority to govern its own environment; a student's educational options, when facing a hostile sexual environment, are severely limited. Because schools "serve as the parent and student's 'home away from home' for seven or more hours of the day,"[22] the problem of peer sexual harassment merits the same treatment as teacher harassment.

Schools cannot disclaim liability for hostile environment sexual harassment simply because other students are the primary harassers. By recognizing Christine Franklin's hostile environment claim, the Court left no doubt that Title IX prohibits sexually hostile educational environments. This

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[20] 503 U.S. 60 (1992).

[21] Id. at 75, citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 64 (1986). The Court found added support for its holding in Franklin in passage of the 1986 Rehabilitation Act Amendments (42 U.S.C. § 2000d-7) and the 1987 Civil Rights Restoration Act (Pub. L. 100-259, 102 Stat. 28). Congress intended Title IX to have the very broad sweep necessary to combat sex discrimination in education. Id. at 72-73.

[22] JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Minn. L. Rev. 163, 171 (1992).

Court refused to read into Title IX any limitations that contravene its language and intent. The Court of Appeals, however, erred in limiting Title IX in this case.

In light of the appellate ruling below, the Court must clarify for the lower courts that Title IX does reach claims of official intentional inaction in the face of an environment of peer sexual harassment.

b. The circuit courts of appeal are in conflict on Title IX's application to peer sexual harassment.

This Court's guidance is critical in resolving the substantial conflict among the federal courts, appellate and trial, on Title IX's applicability to peer sexual harassment. The Court's guidance is also required to assure nationwide uniformity in enforcing Title IX as to peer sexual harassment, by courts and agencies alike.

The Eleventh Circuit in Davis[23] held that a female student stated a Title IX claim for damages against the school district for the sexually hostile environment created by a fellow student's harassment: "when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has 'be[en] denied the benefits of, or ... subjected to discrimination under' that educational program

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[23] Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996). Like Rowinsky, Davis involved repeated physical and verbal sexual harassment of a female student by a fellow student. Despite numerous requests to school officials, the district failed and refused to discipline the harasser and ignored the abuse. The hostile environment seriously affected her mental and emotional health; she even wrote a suicide note.

in violation of Title IX...."[24]

Moreover, the First, Second, Ninth, and Tenth Circuits all have implied that a Title IX action may arise from a school district's deliberate inaction. The First Circuit has indicated that a plaintiff can make out a peer sexual harassment case, using Title VII caselaw by analogy.[25] The Second Circuit has written that a school may be liable under standards similar to Title VII, where supervising authorities "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."[26] The Ninth Circuit has stated that school officials might be reasonably concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment.[27] In yet another case, the Tenth Circuit, while finding the plaintiff had not met the elements for sexual

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[24] Id. at 1194. Davis requires that a plaintiff, to prove a peer sexual harassment case, show: (1) she is a member of a protected group, (2) who was subjected to harassment, (3) that was based on sex; (4) and which was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) to establish some basis for institutional liability. Id.

[25] Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (not finding peer sexual harassment, using Title VII standards).

[26] Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995), citing Catcher v. Rosa & Sullivan Appliance Ctr, 957 F.2d 59, 62 (2d Cir. 1992).

[27] Clyde K. v. Puyallup School Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994), citing Doe v. Petaluma City School Dist., 830 F.Supp. 1560, 1571 (N.D. Cal. 1993).

harassment, has used the test set out in Davis.[28]

In Rowinsky, the Fifth Circuit refused to recognize a Title IX claim for peer sexual harassment, and created conflict with the decisions of other circuit courts.[29] The Court should resolve this conflict in the interest of uniform national enforcement of Title IX on this important issue.

c. District courts also show inconsistency in applying Title IX to peer sexual harassment.

District courts likewise have struggled with the issue and reached widely conflicting conclusions about using Title IX to remedy a school's failure to correct a hostile environment created by peer sexual harassment. Some courts recognize such an action; others do not.

For example, in a Missouri federal case (Bosley v. Kearney R-1 School District[30]), an elementary student suffered severe peer sexual harassment, causing her to require psychological treatment and withdraw from school. Applying this Court's holding in Harris v. Forklift Systems, Inc.,[31] Bosley ruled the key to a hostile environment sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions ... to which members

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[28] Seamons v. Snow, __ F.3d ___, 1996 WL 233483 (10th Cir. 1996), citing Davis, 74 F.3d at 1192 (accepting Davis' analytical model for peer hostile environment sexual harassment claims).

[29] Rowinsky v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996). The Fifth Circuit's opinion in this case was not unanimous. Judge Dennis's dissent very much mirrors Petitioner's argument here.

[30] 904 F.Supp. 1006 (W.D. Mo. 1995) (denying summary judgment for school district on Title IX claim).

[31] 510 U.S. 17 (1993).

of the other sex are not exposed."[32] A school district, once it becomes aware of oppressive, offensive behavior, must take prompt remedial measures "reasonably calculated to end the [sexual] harassment."[33]

Similarly, the Petaluma trial court found that Title IX prohibits hostile environment sexual harassment (although, to obtain damages under Title IX, one must prove intentional discrimination): "it would violate the Supreme Court's command to give Title IX a sweep as broad as its language to find that Title IX does not prohibit hostile environment sexual harassment."[34] In Petaluma, a female student complained of offensive sexual harassment by fellow classmates that took place daily, with little or no interference from school officials. Ultimately, she sought medical and psychological treatment and enrolled in a private school because she could no longer endure the harassment.[35]

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[32] Bosley, 904 F.Supp. at 1022 (citation omitted). The jury awarded the young girl $5,000 in damages. Bosley v. Kearney R-1 School Dist., No. 93-0759-CV-W-9 (W.D. Mo. Oct. 16, 1995). See also Wright v. Mason City Community School Dist., No. C-94-3056 (N.D. Iowa June 10, 1996) (awarding plaintiff damages for peer hostile environment sexual harassment).

[33] Bosley, 904 F.Supp. at 1023. The District Court held, following Franklin's logic, "the same rule as when an employer is held liable for a sexually hostile work environment under Title VII must apply when a school district has knowledge of a sexually hostile school environment and takes no action." Id. at 1021.

[34] Petaluma, 830 F.Supp. at 1571.

[35] Id. at 1564, 1566. The harassment in Petaluma included daily taunts about having sex with a hot dog, sexually explicit graffiti, and name calling such as "hot dog bitch," "slut," and "ho" (slang for whore). Id. at 1562-63.

In Oona R.-S. v. Santa Rosa City Schools,[36] a California district court interpreted Petaluma, with some variance, along with Ninth Circuit dicta in Clyde K.,[37] for the proposition that a school district violates Title IX by encouraging, or failing to appropriately respond to, sexual harassment of female students by male students: "[s]uch discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment."[38]

However, a Connecticut district court came to the opposite conclusion and held that a school's failure to protect students from peer harassment does not violate Title IX.[39]

2. This case presents a question of national importance, meriting the Court's action to ensure consistent and uniform nationwide agency enforcement of a school's duty under Title IX to prevent and curtail peer hostile environment sexual harassment of young female students.

The far-reach of Rowinsky undercuts Title IX guarantees to young women of a learning environment free of sex discrimination. By severely circumscribing a cause of action

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[36] 890 F.Supp. 1452 (N.D. Cal. 1995) (denying and granting various defense motions).

[37] Clyde K., 35 F.3d at 1401 (citation omitted) ("Given the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools").

[38] Oona R.-S., 890 F.Supp. at 1469.

[39] Mennone v. Gordon, 889 F.Supp. 53, 58 (D.Conn. 1995).

for peer hostile environment sexual harassment, the Fifth Circuit undermined agency enforcement of Title IX's broad mandate to end sex discrimination in education. Indeed, Rowinsky may even weaken Title VI enforcement.

a. Rowinsky overrides OCR's uniform nationwide standards for Title IX enforcement.

Just as Rowinsky conflicts with developing case authority that properly applies this Court's precedent, so too does it collide with the U.S. Department of Education's OCR, charged with enforcing Title IX, which interprets peer harassment as a violation. The result is discordant nationwide OCR enforcement, a result Congress did not intend.

Rowinsky requires OCR to tell schools in the Fifth Circuit that they do not offend Title IX if they refuse to curtail known peer hostile environment sexual harassment. In contrast, consistent with Davis, OCR must advise schools within the Eleventh Circuit that they violate Title IX when they do not curtail the same peer sexual harassment.

This problematic comes about in part because the Fifth Circuit erroneously substituted its own judgment for OCR's application of Title IX. The court noted the OCR guidelines but paid them no respect because they did not include an explanation to the court's liking for OCR's decision to address peer harassment.[40]

Rowinsky contradicts this Court's well-established deference to a regulating agency's interpretation of ambiguities in the statute it oversees: "This view of the agency charged with administering the statute is entitled considerable deference; and to sustain it, we need not find that it is the only permissible construction ... but only that ... it is a sufficiently rational one to preclude a court from substituting its own judgment for that [of the agency] Train, Inc. v. NRDC,

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[40] Rowinsky, 80 F.3d at 1015.

421 U.S. 60 (1975)."[41]

OCR, through Letters of Finding, has determined that a student is subjected to sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct ... has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment."[42] OCR also has found that "[w]hen individuals who are participating in a program or activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others."[43] Finally, OCR has decided that, if "the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[44] Nevertheless, in this case, the Fifth Circuit, with little reasoning, boldly rejected OCR's interpretations.

The Petaluma trial court recognized that OCR Letters of Finding are entitled to deference because "they express the opinion of an agency charged with implementing Title IX and

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[41] Young v. Community Nutrition Inst., 476 U.S. 974, 981-82 (1986), quoting Chemical Manufacturers Ass'n. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985).

[42] See Davis, 74 F.3d at 1192 (citing Letter of Finding by John Palomino, Regional Civil Rights Director, Region IV [July 24, 1992], Docket No. 09-92-6002, at 2).

[43] Id.

[44] Id. (citing Letter of Finding by Kenneth Mines, Regional Civil Rights Director, Region V [April 27, 1993], Docket No. 05-92-1174, at 2-4); see also Petaluma, 830 F.Supp. at 1573 (also citing Letter of Finding by Kenneth Mines, Docket No. 05-92-1174)

its regulations."[45] Upon examining OCR Letters of Finding, that court concluded that OCR "believes that an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX."[46] The Fifth Circuit should have accorded the same respect to OCR interpretations.

The Fifth Circuit erroneously concluded that no duty exists for districts to prevent and remedy peer hostile environment sexual harassment. A school district that fails or refuses to provide a non-hostile learning environment for young women should be held accountable, whether in the Fifth Circuit or elsewhere.

b. Rowinsky impacts on OCR's nationwide standards for Title VI (racial harassment) enforcement.

Further, the logical breadth of Rowinsky may have nationwide impact on Title VI[47] peer hostile environment racial harassment cases. In enacting Titles IX and VI, Congress sought to eradicate discrimination in educational programs tied to federal funding. A racially or sexually hostile environment bars the door to opportunity, and a school district participates in that discrimination when it ignores its legal duty to respond effectively and promptly to harassment, which it knows (or should know) to exist.

Unless this Court corrects the appellate court, the ultimate result of Rowinsky is to give schools in the Fifth Circuit license to ignore harmful, discriminatory behavior of students. Thus, schools that refuse to address environments they know to be infected with racial or sexual harassment commit no Title IX or Title VI violation. In other circuits,

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[45] Petaluma, 830 F.Supp. at 1573.

[46] Id.

[47] Title VI of 1964 Civil Rights Act, 42 U.S.C. § 2000d et seq.

notably the Eleventh, the law is otherwise. This absurd result flies in the face of the clear intent of Congress.

c. Titles VI, VII, and IX together present a Congressional plan to end discrimination and promote equal opportunity.

Titles VI, VII, and IX together comprise a comprehensive Congressional effort to rid the country's schools and workplaces of invidious race and sex discrimination that robs many citizens of equal opportunity and deprives the rest of the nation of their best skills and potential. Congress recognized the interconnection of these three pieces of civil rights legislation.[48] Rowinsky disrupts this scheme.

Congress patterned the provisions of Title IX on those of Title VI, borrowing from Title VI's prohibitions against racial bias in educational settings to eliminate sex discrimination in the same setting.[49] Congress relied on the experience gained under Title VI to define the scope and enforcement of Title IX.[50] Likewise, OCR, responsible for enforcement of both Title VI and Title IX, has valuable experience and expertise that guides a proper understanding of both Titles.

OCR guidelines interpreting the scope of Title VI explicitly address peer racial harassment and hold a school district liable for the hostile environment created by peer harassment if supervising authorities knew of and failed to

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[48] 118 Cong. Rec. 5803 (1972) (Senator Bayh).

[49] Title IX "sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." Id. at 5807.

[50] "The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility." Id.

eliminate the harassment.[51] OCR also has interpreted Title IX to require that educational institutions, once they know of peer harassment, take reasonable steps to eliminate it.[52]

Title VII's[53] extensive case law, which prohibits race and sex discrimination in the workplace, serves as an useful analog in understanding the scope of Title IX.[54] Title VII protects women against employment discrimination and safeguards their right to work in an environment free of debilitating harassment. Title IX protects women from the same discrimination in education.

Courts and administrative agencies have learned much about sexual harassment in the workplace that robs women of equal opportunity and hinders their performance.[55] We cannot disregard Title VII's teachings in understanding the pain and frustration of sexual harassment for young women struggling for equal educational opportunities at a delicate period of their lives. The Fifth Circuit erred in ignoring this

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[51] 59 Fed. Reg. 11448, 11449 (1994). See id. at 11451 (citing Title VII cases to show hostile environment harassment is discrimination).

[52] See Petaluma, 830 F.Supp. at 1572-73 (citing OCR policy and Letters of Finding).

[53] Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq.

[54] See Franklin, 503 U.S. 60; Murray, 57 F.3d 243; Davis, 74 F.3d 1186; Brown, 68 F.3d 525; Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Circuit 1988); (all applying Title VII standards to hostile environment sexual harassment in an educational setting).

[55] "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." Harris, 510 U.S. at 17.

valuable lesson.

3. The Court should correct the Fifth Circuit's decision which eviscerated core Title IX guarantees of equal educational opportunities for young women by denying that school districts have a duty to prevent and curtail peer hostile environment sexual harassment.

Because Congress intended Title IX to be a powerful tool to combat widespread discrimination facing women in education,[56] it imbued Title IX with an expansive reach to address the myriad forms of sex discrimination that prevent women and girls from obtaining an education equal to their male colleagues.

Congress wanted Title IX to help peel away the multiple layers of pervasive sex discrimination in education that block women's opportunities in the future: "because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[57] Rowinsky lays a major obstacle on the road to equal opportunity.

CONCLUSION

The Fifth Circuit panel ignored or misapplied this Court's decisions in arriving at the conclusion that Title IX did not provide a cause of action for relief from the kind of pervasive and degrading hostile environment sexual harass-

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[56] Cannon, 441 U.S. at 704 n.36.

[57] 118 Cong. Rec. 5804 (1972) (Senator Bayh, Senate sponsor).

ment faced by Mrs. Rowinsky's daughters.

The Court of Appeals also declined to follow precedent developed by other Courts of Appeals, and discounted, wholesale, interpretative rulings by the Office for Civil Rights of the U. S. Department of Education.

Ultimately, the Fifth Circuit betrayed the ideals held out by Congress to the young women of this nation, that they be free of humiliating and abusive treatment that interferes with, and denigrates, the same educational opportunities accorded to their male colleagues.

Because of the national impact of this case and because of the injustice to Mrs. Rowinsky's daughters, Petitioner prays that the Court grant this petition for certiorari to the Court of Appeals for the Fifth Circuit.

Dated: June 28, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the proper number of true copies of this document was mailed to Jennifer W. Jacobs and Lisa A. Brown, attorneys for Respondent, Bracewell & Patterson, S. Tower Pennzoil Place, 711 Louisiana St., Suite 2900, Houston, Texas 77002-2781, on June 28, 1996.

James C. Harrington

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20049

DEBRA ROWINSKY,
for Herself and as Next Friend of
"Jane Doe" and "Janet Doe," Her Minor Children,
and for All Those similarly Situated,

Plaintiff-Appellant,

VERSUS

BRYAN INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before GARWOOD, SMITH, and DENNIS, Circuit Judges.

JERRY B. SMITH, Circuit Judge:

This appeal presents the question of whether title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et *seq.* ("title IX"), imposes liability on a school district for peer

hostile environment sexual harassment.[1] We conclude that title IX does not impose such liability, absent allegations that the school district itself directly discriminated based on sex. Accordingly, the judgment of the district court is affirmed.

I.

During the 1992-93 school year, students proceeding in this litigation under the pseudonyms of Jane and Janet Doe were eighth graders at Sam Rayburn Middle School in the Bryan Independent School District ("BISD") who rode a BISD school bus to and from school. Boys and girls were required to sit on different sides of the bus, and the bus driver, Bob Owens, enforced the restriction, even, on occasion, telling Jane and Janet not to sit on the boys' side of the bus.

Beginning in September 1992, a male student, whom we identify only by his initials, G.S.," physically and verbally abused Janet on the bus. G.S. regularly swatted Janet's bottom whenever she walked down the aisle and made comments such as, "When are you going to let me fuck you?", "What bra size are you wearing?", and "What size panties are you wearing?" He also called Janet a "whore." At one point, G.S. groped Janet's genital area.

Janet complained to Owens no fewer than eight times that G.S. had swatted her and Jane on their bottoms and used foul language. Owens took down names on a pad of paper. Janet eventually stopped reporting the incidents.

On September 24, G.S. grabbed Jane in her genital area, and, a few minutes later, grabbed her breasts. Jane, Janet, and their parents visited Assistant Principal Randy

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[1] Title IX is enforceable through an implied right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Caperton the next day to complain about the incident.[2] Caperton told the Rowinsky family that he had already heard about the sexual assault from another student and that he believed the nature of the assault merited expelling G.S. Caperton suspended G.S. from riding the bus for three days and required him to sit in the second row behind the driver.

On September 29, Mrs. Rowinsky visited Caperton again to discuss the incident, complaining that other girls were being harassed on the bus. Caperton showed her a bus report that documented the incident with Jane. The report, however, contained numerous inaccuracies, including the fact that it did not name G.S. and listed the wrong date and length of punishment. Caperton corrected the assailant's name in a new report.

The three-day suspension did not deter G.S. He violated the seating requirement, and, as a result, Owens restricted Jane and Janet to the front of the bus. Mrs. Rowinsky called Jay Anding, assistant director of the transportation office, and demanded that he restrict G.S. to the second row seat because of the continuing remarks and misbehavior. Anding told Mrs. Rowinsky that he would speak with Owens. In late November 1992, G.S., with Owens nearby, called the girls offensive names and slapped Janet's buttocks. Owens did nothing, and the girls did not file any complaints.

One morning in December 1992, another male student, whose initials are "L.H.," reached up Janet's skirt, made a crude remark about what he almost touched, and then grabbed her genital area. Janet complained to Owens at the next stoplight, but he "just stared into space." On the afternoon of December 16, L.H. reached up Jane's skirt, touching her near

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[2] The Rowinskys filed sexual assault charges against G.S. with the Bryan city police.

her panty line. Jane did not tell Owens about the incident.

On December 18, Mrs. Rowinsky contacted Anding regarding L.H.'s behavior and told Anding that other girls were being sexually assaulted and gave him their names. Anding said he would investigate the alleged problems on the bus and take action.

On January 12, 1993, Mrs. Rowinsky contacted Caperton to find out the results of the investigation. Caperton told her that Anding had not conducted the investigation but that L.H. had been suspended for three days.[3]

On January 13, Mrs. Rowinsky contacted Dr. Tom Purifoy, BISD director of secondary education, and described the assaults to him. Purifoy did not conduct an independent investigation but referred her to C.W. Henry, Anding's assistant.

On January 14, after reviewing videotapes from the bus, Henry assigned a new driver to replace Owens. There are no further allegations of harassment by G.S. thereafter.

On January 19, the driver assigned Jane the seat next to G.S. Although G.S. made no new assaults, Mrs. Rowinsky removed her daughters from the bus and, on January 22, requested that Purifoy remove G.S. from the bus. Purifoy refused to take any further action against G.S. without proof of the assaults from juvenile records.

On March 30, during class, a third male student, with the initials "F.F.," reached under Janet's shirt and unfastened her bra. The teacher in the classroom sent both students to Vice-Principal Sandra Petty, who sent Janet back to class and suspended F.F. for the rest of the day and the next day. F.F. is not alleged to have harassed or abused the girls further. The next day, Mrs. Rowinsky visited Petty and complained

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[3] L.H. is not alleged to have further harassed or abused the girls after his suspension.

about F.F.'s behavior; Petty responded that she did not consider F.F,'s conduct to be sexual.

On March 30, Mrs. Rowinsky and her attorney met with Dr. Sarah Ashburn, BISD superintendent, to complain about G.S.'s behavior. Ashburn said the three-day bus suspension was sufficient punishment. She did not inform them about the existence of title IX or any title IX grievance procedures.

On May 4, Mrs. Rowinsky met with Ashburn and complained about her failure to take action against G.S. and L.H. Ashburn considered her actions against G.S. sufficient and informed Mrs. Rowinsky that she did not deem what had happened to Jane and Janet to be assaults. She refused to take further action, in part because L.H. was no longer a student in BISD. Mrs. Rowinsky told Ashburn that she intended to file a grievance with the United States Department of Education Office of Civil Rights ("OCR").

II.

Debra Rowinsky brought this action for herself[4] and as next friend, on behalf of her minor daughters, Jane and Janet Doe, and all those similarly situated,[5] alleging that

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[4] We conclude that Rowinsky does not have standing to assert a personal claim under title IX. It is undisputed that she has standing, as next of friend, to assert the claims of her daughters, but nothing in the statutory language provides her with a personal claim under title IX. Even assuming that title IX protects persons other than students and employees, Rowinsky has failed assert that she was excluded from participation, denied the benefits of, or subjected to discrimination under any education program or activity. Absent such a claim, the plain language of title IX does not support a cause of action by Rowinsky.

[5] The district court did not rule on the request for class certification. The plaintiffs do not complain of that failure on appeal.

BISD and its officials[6] condoned and caused hostile environment sexual harassment.[7] Specifically, the complaint asserts that Janet was sexually harassed at Sam Rayburn Middle School ("the school") by a student and that Jane and Janet were sexually harassed by other school children while riding the BISD school bus. Rowinsky seeks declaratory and injunctive relief, as well as compensatory damages and attorney's fees under title IX.

The district court held that Rowinsky had failed to state a claim under title IX because there was no evidence that BISD had discriminated against students on the basis of sex; Rowinsky had failed to provide evidence that sexual harassment and misconduct was treated less severely toward girls than toward boys.

The court relied on a number of facts. The first was that boys who assaulted boys were punished in the same fashion as boys who assaulted girls. The court concluded that any disparity in punishments between particular incidents was not made on the basis of sex, because the individual incidents involved different levels of physical conduct. Moreover, misconduct by one of the harassers was never reported by the students. The second factor was that any failure to train employees would harm male and female victims of harassment equally.

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[6] The district court dismissed all claims against the officials of BISD, leaving the school district as the only defendant. Rowinsky has not appealed that decision.

[7] In his dissent, Judge Dennis opines that under the alleged facts, the school board "knowingly failed to take appropriate steps to protect Jane and Janet Doe from sexual harassment, abuse and discrimination . . ." Dissent at 3. We express no normative view regarding BISD's conduct, for our duty as a court is only to decide whether the alleged conduct or neglect is actionable under title IX.

III.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activities receiving Federal financial assistance." 20 U.S.C. § 1681 (a) (1993). At issue here is whether a school district may be liable under title IX when one student sexually harasses another.[8] At a broader level of generality, we are asked to decide whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other

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[8] Two months after this case was argued, the Eleventh Circuit held that title IX imposes liability on a school district for peer sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *suggestion for rehearing en banc filed.* Nothing in *Davis* alters our analysis, however. As will become evident, we disagree with the Eleventh Circuit's statutory construction and selective use of legislative history.

With the exception of the Eleventh Circuit, no circuit court of appeals has found a school district liable for peer sexual harassment. In a qualified immunity case, the Ninth Circuit assumed *arguendo* that title IX applies to peer harassment but granted immunity because the law was not clear at the time of the incident. *See Doe v. petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1994) (denying relief on qualified immunity grounds but noting that under current law qualified immunity would not protect a school official from liability in a peer sexual harassment claim)

Another circuit assumed *arguendo* that sexual harassment by a third party is actionable under title IX, but denied relief on alternative grounds. *See Murray v. New York Univ. college of Dentistry*, 57 F.3d 243 (2d Cir. 1995) (finding no liability when patient harassed a dental student because the university did not have sufficient notice of the harassment). The analysis in *Murray*, however, is not persuasive, as the case should be properly understood as an employment suit: First, the court analyzed the case as an employment case. Second, the unique nature of dental and medical schools makes its students quasi-employees. *See Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (applying title VII standards to a peer harassment case in a medical school because medical students should be viewed as employees).

than the grant recipient or its agents.[9]

The linchpin of Rowinsky's theory is the assumption that a grant recipient[10] need not engage in prohibited conduct to violate title IX. The specific statutory phrase at issue is the prohibition that "[n]o person be subjected to discrimination under any educational program or activities." Rowinsky focuses solely upon that phrase and argues that "under" means "in" and not "by." By making this substitution, she reasons that the statute cannot be limited to acts of discrimination by grant recipients.[11]

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[9] The dissent, perhaps recognizing the weakness of Rowinsky's argument, circumvents this issue by claiming that a student is an agent of the grant recipient. *See* Dissent at 20 (citing *Vernonia Sch. Dist. 47J v. Acton*, 115 S.Ct. 2386 (1995)). The dissent's approach is novel and, in our view, erroneous.

Acton and its predecessor, *New Jersey v. T.L.Q.*, 469 U.S. 325 (1985), stand for the proposition that the Constitution does not preclude a public school's having the power to discipline and control students who are in its care. Recognizing that a school has the power to discipline a student is a far cry from making the student an agent of the school. *Johnson v. Dallas Indep. Ech. Dist.*, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995), also lends no support to the dissent's theory. Even if, *arguendo*, there were an obligation to protect students from foreseeably dangerous harm, such a duty would not transform the relationship between school and student into an agency relationship. *See also Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc) (no duty to protect student, attending voluntarily, from third party non-state actors).

[10] For purposes of this opinion, we refer to both the grant recipient and its agents as grant recipients.

[11] The second step in Rowinsky's argument is to interpret the word "discrimination" to include hostile environment sexual harassment. See *Davis*, 74 F.3d at 1193 ("Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompass-

es a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.") (footnote and citations omitted). We believe, however, that importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic.

At a theoretical level, the problem with sexual harassment is "the unwanted imposition of sexual requirements in the context of unequal power." Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). In an employment context, the actions of a co-worker sometimes may be imputed to an employer through a theory of respondeat superior.

In an educational setting, the power relationship is the one between the educational institution and the student. *See* Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 533-36 (1987). In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support. Unwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker. This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient--a power relationship between the harasser and the victim.

Even the dissent recognizes that employer liability for acts of non-supervisors is predicated on some theory of agency. *See* Dissent at 10-11 & n.7 ("As explained in *Meritor*, . . . an employer's liability for 'hostile environment' sex discrimination generally is based on the employer's failure to take reasonable corrective measures after receiving knowledge that an employee is being subjected to sexual harassment or abuse in the work environment by coworkers or non-employees over whom the employer has a degree of control or legal responsibility.")

Title VII cases (cited by Rowinsky) that have found liability for harassment by third parties are inapplicable, because in those cases the power of the employer was implicated. *See Sparks v. Regional Medical Ctr. Bd.*, 792 F. Supp. 735, 738 n.1 (N.D. Ala. 1992) (holding medical center responsible for sexual harassment of employee by independent-contractor physician); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (blackjack dealer harassed by customers); *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500 (E.D. Va. 1992) (automobile

A.

As with any statute, our starting point in determining the scope of title IX is the statutory language. *Bailey v. United States*, 116 5. Ct. 501, 504 (1995); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Rowinsky's interpretation of title IX relies on isolating the prohibition against discrimination and recognizing that the statutory phrase does not, on its own, limit title IX to the acts of grant recipients. Determining the plain meaning of a statutory word or phrase, however, is only the starting point in statutory construction. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey*, 116 S. Ct. at 506. Thus, even if, *arguendo*, "under" means "in," this does not fully answer the interpretive question; we must look to the remainder of the statute to see whether there are any limits on "who" is prohibited from discriminating against students "in" an educational program.

We begin by noting that the text of title IX does not

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supplier's representative harassed by dealership manager)

The dissent's reliance on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) for the inference that sexual harassment by students may be attributed to the school board is also misplaced. *See* Dissent at 12, 18. First, sexual harassment by a teacher falls within the framework of *Meritor* because a teacher is an employee of the grant recipient. Thus, like the normal sexual harassment case, it is an agent of the defendant who is guilty of the harassment. Second, any language in *Franklin* regarding teacher-student sexual harassment is pure *dictum*; the district court dismissed, and the Eleventh circuit affirmed dismissal under FED. R. CIV. P. 12(b) (6), based solely on the ground that compensatory relief was unavailable for violations of title IX. *See Franklin v. Gwinnett County Pub. Sch.*, 911 F.2d 617, 618 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992).

provide an unambiguous answer to the question. The title contains three general prohibitions: No person shall be excluded from participation in a program, denied the benefits of a program, or subjected to discrimination under a program. As is the case with the prohibition on. discrimination, each of the other prohibitions, taken in isolation, is not explicitly limited to the acts of grant recipients.

Take, for example, the first prohibition. It reads as follows: No person ... shall ... be excluded from participation in ... any educational program." Like the prohibition on discrimination, this proscription could encompass the acts of third parties.

On the other hand, the open-ended language of title IX does not support an inference that the statute applies to the conduct of third parties. Title IX was drafted in a way that identifies a benefited class in order to imply a private right of action.[12] Congress did not simply prohibit grant recipients from engaging in certain conduct, because to do so would be inconsistent with creating justiciable rights for its beneficiaries. Thus, the language of title IX is driven not by the desire to leave the class of wrongdoers undefined, but by the nature of the right protected.[13]

Despite the ambiguity in the text, three factors weigh in favor of interpreting title IX to impose liability only for the

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[12] *Cannon*, 441 U.S. at 690-91 ("There would be far less reason to infer a private remedy in favor of individual persons if congress, instead of drafting title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.").

[13] *Id.* at 693 n.13 ("Put somewhat differently, because the right to be free of discrimination is a 'personal' one, a statute conferring such a right will almost have to be phrased in terms of the persons benefited.").

acts of grant recipients. The first is the scope and structure of the title itself; the second is the legislative history; the third is agency interpretations of the statute.

B.

The fact that title IX was enacted pursuant to Congress's spending power is evidence that it prohibits discriminatory acts only by grant recipients. As an exercise of Congress's spending power,[14] title IX makes funds available

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[14] Although the Supreme Court has reserved the issue of whether title IX was enacted under the Spending Clause rather than § 5 of the Fourteenth Amendment, precedent strongly suggests that title IX, like its model, title VI, was enacted under the former. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) (White, J.). In *Guardians*, at least five Justices held that title VI was enacted pursuant to the Spending Clause. *See id.* at 598-99 (White, J.), *id.* at 636-38 (Stevens, J. dissenting). Title IX was modeled after title VI and uses identical language, giving rise to an inference that title IX also was enacted pursuant to the Spending Clause.

An additional reason for interpreting title IX as a statute authorized by Congress's spending power is that the statute regulates purely private academic institutions. While the receipt of state funding may transform a private school into a state actor for Fourteenth Amendment purposes, the receipt of *federal* funds does not make a private school a *state* actor. Thus, any attempt to impose title IX liability on a private educational institution that receives no state funds would push the limits of the Fourteenth Amendment.

Finally, the Court has been cautious about attributing Congressional intent to act under its authority to enforce the Fourteenth Amendment, "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority." *Pennhurst State Ech. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981). Nothing in title IX demonstrates an intent to enforce the Fourteenth Amendment, and its language and structure demonstrate that it is a spending statute. "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." *Id.* at 18.

to a recipient in return for the recipient's adherence to the conditions of the grant. While it is plausible that the condition imposed could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves.

This is so because the value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds. In order for the coercion to be effective, the likelihood of violating the prohibition cannot be too great. This is especially true when the spending Condition also includes an implied right of action.

Imposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of title IX.[15] Thus, the possibility of a violation would be so great that recipients would be induced to turn down the grants. We find it unlikely that Congress would impose conditions on federal funds that would render the funds so unattractive to potential recipients, because to do so would render the conditions almost useless.

The structure of title IX supports the conclusion that

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[15] Take, for example, a situation in which the parents of a female student discourage her from studying and taking advantage of opportunities at school because they believe that a woman should not concentrate on an education. If the school had knowledge of the parents' interference and did nothing to stop it, Rowinsky's logic would make the school liable under title IX. The argument would proceed as follows: The girl is being subjected to discrimination because the parents are treating her differently from boys; the girl is being denied the full benefits of the educational program because of the discrimination; and the school has done nothing to stop the discrimination.

the spending conditions apply only to the conduct of grant recipients. With the exception of the one phrase upon which Rowinsky relies, the statute discusses discrimination by grant recipients. For example, numerous provisions exempt certain entities from coverage.[16] Other provisions exempt certain practices.[17] The statute's emphasis on grant recipients supports a conclusion that the statute applies only to the practices of the recipients themselves.

C.

The legislative history of title IX also supports limiting the statute to the practices of grant recipients. The Supreme Court has repeatedly stated that the purpose of title IX is to prevent discrimination by grant recipients. In *Cannon*, the Court reviewed the legislative history of title IX and concluded that

> title IX, like its model title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First Congress wanted to avoid the use of federal resources to support *discriminatory practices*; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

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[16] *See, e.g.*, § 1681 (a) (3) (exempting religious institutions if title IX is inconsistent with the religious tenets of the organization); § 1681 (a) (5) (exempting traditional single-sex colleges); § 1681 (a) (7) (exempting Boys State and Girls State programs).

[17] *See* § 1681 (a) (9) (beauty pageants)

441 U.S. at 704 (emphasis added).[18]

Throughout the legislative history, both supporters and opponents of the amendment focused exclusively on acts by the grant recipients. Senator Bayh introduced the amendment and listed the types of sex discrimination, *all by grant recipients*, that prompted the legislation. 118 Cong.Rec. at 5803 (1972) ("It is clear to me that sex discrimination reaches into all facets of education-admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."). The senator described the "heart" of the amendment as "a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.*[19]

Numerous other statements support the conclusion that title IX targets only acts by the grant recipients. Senator Bayh discussed the general prohibition against sex discrimination:

Central to my amendment are sections 1001-1-

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[18] *See also Grove City College v. Bell*, 465 U.S. 555, 577 (1983) (Powell, J., concurring) ("The sole purpose of the statute is to make unlawful *'discrimination'* by recipients of federal assistance programs."); *id.* at 585 (Brennan, J., concurring) ("As explained by its sponsor, the [precursor] amendment [to title IX] would have prohibited sex discrimination 'by any public institution of higher education or any institution of graduate education receiving Federal educational financial assistance.'").

[19] Although the statements of one legislator made during debate may not be controlling, Senator Bayh's remarks, coming from the sponsor of the language ultimately enacted, have been treated as authoritative to the statute's construction. *See North Haven*, 464 U.S. at 526-27. *See also Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (holding that statements by legislative sponsor "deserv[e] to be accorded substantial weight").

> 005, which would prohibit discrimination on the basis of sex in federally funded education programs . . . .
>
> This portion of the amendment covers discrimination in all areas where abuse has been mentioned--employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

118 Cong.Rec. at 5807. In a colloquy with Senator Pell, Senator Bayh stated:

> As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

Id. at 5812.

The drafters of title IX recognized that it was not a panacea for all types of sex discrimination, but rather a limited initial attempt to end discrimination by educational institutions. Again, Senator Bayh recognized that

> [w]hile the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs -- an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their

choice with equal pay for equal work.

Id. at 5808.

Further evidence that title IX was not intended as a cure for all types of discrimination comes from the fact that the original amendment mandated a study of sex discrimination in order to suggest further legislative remedies. *Id.* at 5803. Such a requirement--and the recognition that further legislation might be necessary--would be superfluous under Rowinsky's interpretation of title IX.

D.

The OCR's interpretation of title IX is consistent with refusing to impose liability for the acts of third parties.[20] The primary interpretation of title IX is found in its implementing regulations. *See* 34 C.F.R. § 106.31. The entire section is devoted to acts by the recipients themselves.[21]

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[20] When interpreting title IX, we accord the OCR's interpretations appreciable deference. *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). The deference accorded interpretive regulations depends on such factors as the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise. *Board of Educ. v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979) (citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)), *cert. denied*, 449 U.S. 1124 (1981). Legislative regulations are accorded more than mere deference or weight. *Id.*

[21] Both Rowinsky and some district courts take the language of the implementing regulations out of context to support extending title IX to peer harassment. *See Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1289 (N.D. Cal. 1993) ("The implementing regulations of title IX forbid any sex-based limitation 'in the enjoyment of any rights, privilege, advantage or opportunity' related to federally funded education."). But, like any statute or regulation, the specific prohibition in 34 C.F.R. § 106.31(b)(7) must be read in context. The entire regulation is as follows:

(b) *Specific prohibitions.* Except as provided in this

The most definitive statement by the OCR on sexual harassment focuses on conduct by employees or agents of the recipient. The OCR's Policy Memorandum contains the following definition:

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX.

OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) (emphasis added). In particular, the agency left unresolved the issue of peer sexual harassment. *Id.* at 10 ("The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other students.").[22]

> subpart, in providing any aid, benefit, or service to a student, *a recipient shall not*, on the basis of sex:
>
> . . .
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Read in context, the regulation prohibits *recipients* from limiting the rights, privileges, advantages or opportunities of students. The regulation cannot reasonably be read to include the actions of third parties.

[22] It is no coincidence that the OCR leaves the issue of peer harassment unresolved. The OCR's source of jurisdiction over sexual harassment is 34 C.F.R. 3106.31(b). OCR Policy Memorandum at 1. As we have discussed, *see supra* note 19, § 3106.31(b) prohibits discrimination by grant recipients. Sexual harassment by third parties is beyond the jurisdiction of the OCR unless the power of the school district is somehow

The only OCR documents to apply title IX to peer sexual harassment, i.e., recent Letters of Finding, should be accorded little weight. Any weight the letters do have are outweighed by both the implementing regulations and the Policy Memorandum promulgated by the OCR. As a legislative regulation, the implementing regulations found at 59 C.F.R. § 106 are accorded far greater deference than are interpretive regulations such as Letters of Finding. *Harris*, 622 F.2d at 613. The Policy Memorandum deserves more deference because it represents a deliberate policy statement by the agency and is consistent with past agency interpretations. *See id.*

Even standing alone, the Letters of Finding should be accorded very little deference, because none of the traditional factors supporting deference are present. The letters are promulgated during investigations of specific institutions, and their purpose is to compel voluntary compliance by an offending institution. *See Doe v. Fetaluma City Sch. Dist.*, 54 F.3d 1447, 1456 (9th Cir. 1995). Because of the pressures to settle in an investigation, the circumstances surrounding their promulgation are significant. *Accord Harris*, 622 F.2d at 613. In addition, the OCR has only recently treated complaints of peer harassment as within its jurisdiction. *Id.* Finally, the letters do not reflect the deliberate consideration of a rulemaking proceeding. *Id.*

The only agency interpretation to support Rowinsky's position involves title VI. The OCR considers peer hostile environment racial harassment a violation of title VI. 59 Fed. Reg. 11448, 11449 (1994). Nothing in the regulations or commentary explains why title VI applies to the acts of non-recipients. The only analysis the OCR makes is to cite title VII cases for the proposition that a hostile environment

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implicated by the third party.

can be discrimination. *Id.* at 11451. Absent a reasoned explanation for why the statutory language supports applying title VI to peer harassment, the OCR's interpretation should not be accorded any deference.

IV.

This case was decided by the district court on motion for summary judgment. On the question of whether there was a genuine issue of material fact as required by FED. R. CIV. P. 56, we conclude that under the legal standard articulated by the district court, and affirmed by this court, the plaintiff has failed to allege or provide evidence that supports a cause of action under title IX.

The mere existence of sexual harassment does not necessarily constitute sexual discrimination. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982), *adopted in Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Barnes v. Castle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). Both men and women can be the victims or perpetrators of sexual harassment. Schneider, *supra* note 9, at 531 n.30. For example, this circuit has recognized that same-sex sexual harassment is not always sex discrimination under title VII.[23] In the same vein, sexual overtures directed at both sexes, or behavior equally offensive to both males and females, is not

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[23] *See Blake v. City of Laredo*, No. 95-40060 (5th Cir. June 9, 1995) (per curiam) (unpublished) (holding that male-on-male sexual harassment does not state title VII claim); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994) (holding that male-on-male sexual harassment is not sex discrimination); *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (per curiam) (unpublished) (holding that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex). *But see Sardinia v. Dellwood Foods*, 64 U.S.L.W. 2329 (S.D.N.Y. Nov. 1, 1995); EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11(b) (1986).

sex discrimination. *See Henson*, 682 F.2d at 904.

In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys. As the district court correctly pointed out, however, Rowinsky failed to allege facts to support such a claim. The judgment is AFFIRMED.

DENNIS, Circuit Judge, dissenting.

This case presents the question whether the plaintiffs, "Jane Doe" and "Janet Doe," eighth grade students in a school system receiving federal funds, may maintain a federal court action under Title IX of the Educational Amendments, 20 U.S.C. § 1681, for monetary damages, a declaratory judgment and injunctive relief against the school board. The plaintiffs alleged and showed that the board failed to take appropriate corrective action after it received knowledge of the plaintiffs' sexual harassment by male students that created for the plaintiffs a hostile educational environment. The district court granted the school board's motion for summary judgment, holding that Jane and Janet Doe had failed to state a claim because they did not allege or show that the board discriminated against them by affording male students greater protection from sexual abuse than females. The majority of this panel affirms, holding similarly, that "[i]n the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." Slip op. at 19-20. Because I believe that the plaintiffs have stated valid claims for the relief requested under Title IX, and are entitled to proceed to trial thereon,[1]

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[1] In reaching this conclusion, I am in agreement with the only other circuit court to squarely address this issue. *See Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir. 1996) (holding that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment."); *see also Bosley v. Kearney R-1 School District*, 904 F.Supp. 1006 (W.D.Mo. 1995) (recognizing Title IX cause of action against school board for peer sexual

I respectfully dissent.[2]

I.

In reviewing the district court's grant of summary judgment, this court applies the *same* standard of review as the district court. *Garcia v. Elf Atochern North America,* 28 F.3d 446, 449 (5th Cir. 1994), *Jurgens v. E.E.O.C.,* 903 F.2d 386, 388 (5th Cir. 1990). The pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, must demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Under this standard, factual findings and inferences are considered with deference to the nonmovant. *Garcia,* 28 F.3d at 449.

The facts emerging from the pleadings and motion for summary judgment filings are set forth in detail in the majority opinion. There can be no doubt that these facts, viewed in the light most favorable to the plaintiffs for purposes of our summary judgment review, demonstrate that the school board knowingly failed to take appropriate steps to protect Jane and Janet Doe from sexual harassment, abuse and discrimination by male students that was sufficiently severe or pervasive as to create a hostile and abusive educational environment for the plaintiffs. Neither the district court nor the majority express disagreement with this conclusion. Their decisions rather are that as a matter of law female students do not have a right of action under Title IX against any educational institution receiving federal funds on the ground that the institution has knowingly allowed male students to create

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abuse where the school board intentionally fails to take proper remedial action).

[2] I join in the opinion only to the extent that it finds that Mrs. Rowinsky, the mother of Jane and Janet Doe, individually lacks standing under Title IX.

a hostile educational environment by sexual harassment of those students.

II.

Title IX of the Education Amendments Act of 1972 prohibits sex discrimination in any educational program or activity receiving federal financial assistance:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

20 U.S.C. § 1681(a). It is undisputed that at the time of the sexual harassment and abuse of the plaintiffs the school board was an educational program receiving federal financial assistance.

Supreme Court precedent interpreting the scope of Title IX establishes that the statute creates a broad federal protection privately enforceable by beneficiaries of the act. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), the Supreme Court held that Title IX is enforceable through an implied right of action by certain classes of private parties. The Court applied the four factors set forth in *Cort v. Ash,* 422 U.S. 66, 78 (1975) for analyzing whether a private right of action is to be implied under a federal statute: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted? (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? and (4) is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? The Court concluded that notwith-

standing Title IX's failure to expressly authorize a private right of action, a woman who, because of her sex, is denied admission to an education program of an institution which receives federal financial assistance may maintain a federal action for violation of Title IX, since a woman who is discriminated against on the basis of sex is a member of the class for whose especial benefit Title IX was enacted; the legislative history indicates Congress' intent to create a private cause of action for a person excluded, on the basis of sex, from participation in a federally funded program; implication of a private remedy under Title IX is fully consistent with the orderly enforcement of Title IX; and the subject matter of private action under Title IX (invidious sex discrimination) does not involve an area basically of concern to the States. Having determined that private remedies are available under Title IX, the Court ended its analysis and refrained from addressing the specific types of private remedies available. *Id.* at 709, 717.

More recently, in *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1992), the Supreme Court addressed the issue of remedies and held that the implied private right of action under Title IX includes a right to a claim for money damages. In *Franklin,* the plaintiff, a female high school student, filed suit under Title IX against a county school board receiving federal funds, alleging that she had been subjected to continual sexual harassment and abuse by a teacher and that, although administrators and other teachers became aware of and investigated the teacher's sexual harassment of her and other female students, no action was taken to halt the abuse and she was discouraged from pressing charges against the teacher. The district court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The court of appeals affirmed. *Franklin v. Gwinnett County Public Schools,* 911 F.2d 617 (11th Cir.

1990), *rev'd by* 503 U.S. 60 (1992).

The Supreme Court reversed, basing its holding that a damages remedy is available for an action brought to enforce Title IX primarily on the longstanding general rule that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. *Franklin,* 503 U.S. at 66-68 (citing, *inter alia, Bell v. Hood,* 327 U.S. 678 (1946)).[3]

In examining Title IX to determine whether Congress had limited the remedies available, the Court observed that because the *Cannon* Court inferred a cause of action upon concluding that Title IX provided no express right of action, the silence of the pre-Cannon statutory text and legislative

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[3] The Court rejected an argument that the rule had disappeared in succeeding decades, citing several instances of its adherence to the traditional "any available relief" presumption. Discussing *Guardians Assn. v. Civil Service Comm 'n of New York City,* 463 U.S. 582 (1983), the Court observed that "[t]hough the multiple opinions in Guardians suggest the difficulty of inferring the common ground among the Justices in that case, a clear majority expressed the view that damages were available under Title VI [the closely analogous model for Title IX] in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action.") *Franklin,* 503 U.S. at 70. The Court also acknowledged that in *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984), it had held that the 1978 amendment to § 504 of the Rehabilitation Act of 1973--which had expressly incorporated the "remedies, procedures, and rights set forth in title VI" (29 U.S.C. § 794a(a) (2))--authorizes an award of backpay. *Franklin,* 503 U.S. at 70. It is worth noting that in *Daronne,* the Court unanimously observed that a majority in *Guardians* had "agreed that retroactive relief is available to private plaintiffs for all discrimination, *whether intentional or unintentional,* that is actionable under Title VI." 465 U.S. at 630 n.9 (emphasis added).

history on the issue of available remedies is neither surprising nor enlightening. Rather, the appropriate inquiry for the pre-*Cannon* period is the state of the law when Congress passed Title IX. Because, at that time, the traditional presumption in favor of all available remedies was firmly established, and the Court, in the decade prior to Title IX's enactment, had found implied rights of action in six cases and approved a damages remedy in three of them, the Court concluded that the lack of any legislative intent to abandon the traditional presumption was amply demonstrated. For the post-*Cannon* period, when Congress was legislating with full Cognizance of that decision, the Court's analysis of the text and history of the two statutes enacted to amend Title IX--the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987--established that Congress validated *Cannon's* holding and made no effort to alter the traditional presumption. *See Franklin,* 503 U.S. at 1035-37.

In unanimously upholding the plaintiff's private cause of action,[4] moreover, the Franklin Court necessarily must have concluded that under the *Cannon-Ash v. Cort* analysis high school students whom the school board knowingly allows to be subjected to sexual harassment and abuse deleteriously affecting their educational environment are persons who have been discriminated against on the basis of sex and are therefore members of the class for whose especial

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[4] The holding that Title IX implies a right of action for damages by a female student for "hostile environment" sexual harassment was unanimous. In a separate concurring opinion, Justice Scalia, joined by the Chief Justice and Justice Thomas, agreed with the Court's disposition of the case, observing that [b]ecause of legislation enacted subsequent to Cannon, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate." *Franklin,* 503 U.S. at 1939 (Scalia, J., concurring).

benefit Title IX was enacted, for whom Congress intended to create a private cause of action, for whom implication of a private remedy under Title IX is fully consistent with its orderly enforcement, and that the subject matter of their private action under Title IX does not involve an area basically of concern to the states.

Most important to the case at bar, however, the *Franklin* Court interpreted Title IX as placing on the school board a duty not to discriminate on the basis of sex, by knowingly failing to take appropriate corrective action when a male teacher has sexually harassed and abused a female high school student and thereby created for her a hostile educational environment. The Court elaborated on this subject in rejecting the argument by the board and the government that the Court should not apply the traditional presumption in favor of appropriate relief because Title IX was enacted pursuant to Congress's Spending Clause power.[5] The Court explained:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an uninten-

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[5] Although the Court noted Franklin's argument that Title IX also rests on powers derived from § 5 of the Fourteenth amendment, the Court found it unnecessary to decide which power Congress utilized because it had concluded that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute. *See Franklin*, 503 U.S. at 75 n.8.

> tional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See id.* at 17, 67 L.Ed. 2d 694, 101 5. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64, 91 L.Ed.2d 49, 106 5. Ct. 2399 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional violations it sought to proscribe.

Franklin, 503 U.S. at 75. (Underscoring supplied; italics in original).

Accordingly, the Supreme Court in *Franklin* not only recognized a right to money damages as a remedy available under a private right of action based on an intentional violation of Title IX; the Court also acknowledged that an educational institution receiving federal funds intentionally violates Title IX and engages in sex discrimination against which the statute affords protection when it knowingly fails to take reasonable steps within its power to prevent the sexual harassment or abuse of a student by a teacher that is so severe or pervasive that it creates a hostile and harmful school atmosphere for that student. By citing *Meritor Savings Bank,* in which the Court held that a claim of "hostile environment" sex discrimination is actionable under Title VII, as analogous

precedent for its interpretation of Title IX, the Court indicated that standards similar to those applied or adverted to in *Meritor* are appropriate criteria for determining when there has been a violation of Title IX giving rise to a claim of "hostile environment" sex discrimination.[6]

As explained in *Meritor*, as well as antecedent cases and EEOC Guidelines discussed therein, an employer's liability for "hostile environment" sex discrimination generally is based on the employer's failure to take reasonable corrective measures after receiving knowledge that an employee is being subjected to sexual harassment or abuse in the work environment by co-workers (or non-employees over whom the employer has a degree of control or legal responsibility). In other words, employer liability for hostile environment harassment by coworkers and non-employees under Title VII is predicated on the *employer's failure* to act in accordance with its statutory duty not to discriminate in the workplace on the basis of "race, color, religion, sex or national origin" with respect to its "terms, conditions, or privileges of employ-

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[6] The High Court's acknowledgment in *Franklin* that a school employee's sexual abuse of students is "unquestionably" sex discrimination prohibited by Title IX, moreover, demonstrates that, under the statute's broad directive, the term "discrimination" is not limited to the situations, such as admissions, scholarships, hiring and promotions, that appear to have been the focus of the congressional debates on the Educational Amendments. *See* slip Op. at pp. 13-15] (discussing legislative history). Rather, a student is "excluded from participation in, [] denied the benefits of or subjected to discrimination under," 20 U.S.C. § 1681, a federally funded program when she is sexually abused by an employee of that program. Further, in finding that a school district can be liable under Title IX for the unauthorized acts of its agents, the Court established that a federally funded program may be liable for conduct extending beyond the practices, policies and decisionmaking directly attributable to it, even though Title IX's language is not expressly directed to conduct of the program's agents or others.

ment," 42 U.S.C. § 200e-2(a)(1), by requiring an employee to work in an environment permeated with "discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . ."[7] *Harris v.*

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[7] In *Meritor,* the Court held that the court of appeals had erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. The Court observed, however, that under agency principles absence of notice to the employer will not necessarily insulate it from liability for a supervisor's sexual harassment. 477 U.S. at 69-73. The present case does not require that we address the issue of vicarious liability by the school board because the plaintiffs here have alleged and shown that the school board was itself negligent because it had knowledge of the sexual harassment and failed to take appropriate corrective measures.

The majority states on page 9, footnote 11, of its opinion that my acknowledgement that an employer is liable for its knowing failure to take reasonable steps to correct co-worker or non-employee harassment "recognizes that employer liability for the acts of non-supervisors is predicated on some theory of agency," and that my reliance on *Franklin* is misplaced here because in that case the sexual harassment by a teacher fell within the *Meritor* framework because a teacher is an agent of the school board. The majority thus suggests that under agency principles, employer liability is necessarily based on some form of vicarious liability. It is certainly recognized under agency principles that a principal may be vicariously liable for the acts of agents under certain circumstances. Nonetheless, agency law also recognizes that direct liability is imposed on principals for *their tortious* conduct. See, e.g. *id.* § 219(2) (master is liable for torts of servants acting outside the scope of their employment if "(a) the master intended the conduct or consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master . . ."). The fact that the law of agency incorporates principles of tort liability thus does not detract from the recognition that in the context of hostile environment harassment by non-supervisors, an employer's liability is not vicarious, but is directly predicated on its own negligent conduct in breaching a duty to act imposed by Title VII. *See* RESTATEMENT 2D OF TORTS § 284 (b) (negligent conduct includes

Forklift Systems, Inc., ___ U.S. __, 114 5. Ct. 367, 370 (1993) (quoting *Meritor,* 477 U.S. at 65, 67). Consequently, the *Franklin* Court's recognition of this type of claim under Title IX necessarily indicates that a student subjected to severe sexual harassment by other students in the school environment may recover for damages sustained thereby from a federally funded educational institution if its board had knowledge of the harassment and failed to take appropriate corrective action.

In *Meritor,* the Supreme Court addressed for the first time a number of issues relating to Title VII hostile environment sexual harassment claims. Although the case involved a female bank employee who was allegedly subjected to sexual harassment by her male supervisor, and therefore did not directly address sexual harassment by nonsupervisory employees or non-employees, some of the principles enunciated by the Court apply generally to all cases in which discrimination based on sex creates a hostile or abusive work environment. The Court held that unwelcome sexual advances that create an offensive or hostile working environment

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"a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do); *see also Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990) (discussion of employer liability for co-worker sexual harassment). As Judge Posner explains in *Guess*, the use of the term "respondeat superior" to describe employer liability in this context is a misnomer. Rather the "knew or should have known" standard imposes

> a negligence standard that closely resembles the 'fellow servant rule' [under which] the employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee's torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate corrective action.

Id. at 465.

may violate Title VII, and that when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex. This proposition was not challenged by any party in the case. It is implicit in the Court's opinion and explicit in authorities it cited with approval that the same principle applies to sexual harassment by co-workers and even strangers to the workplace: When a nonsupervisory employee or non-employee sexually harasses an employee, that co-worker or non-employee likewise discriminates on the basis of sex.

The *Meritor* Court noted that in 1980 the EEOC issued Guidelines specifying that sexual harassment, as there defined, is a form of sex discrimination prohibited by Title VII; and that as an administrative interpretation of the Act by the enforcing agency, these Guidelines, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. In defining "sexual harassment," the Court observed, the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, 29 C.F.R. § 1604.11(a) (1985), and provide that such sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. § 1604.-11(a)(3). The Court found it significant that, in concluding that so called "hostile environment" (i.e., non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in

an environment free from discriminatory intimidation, ridicule, and insult. *See Meritor*, 477 U.S. at 65-67 (citing, *inter alia*, 45 Fed. Reg. 74676 (1980); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982)). In *Henson*, the Court of Appeals had observed that "[t]he environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." *Id.* at 910 (citations omitted).

Although the Court in *Meritor* expressly addressed only the subject of sexual harassment by a supervisor of a subordinate, the Court's heavy reliance on and approval of the EEOC guidelines, as well as the general principles it announced, strongly imply also the Court's approval of the EEOC Guidelines regarding sexual harassment by non-supervisory co-workers and non-employees. Those Guidelines, in pertinent part, provide:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. § 1604.11(d)
>
> An employer may also be responsible for acts of non-employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appro-

> priate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.
>
> § 1604.11(e)

The rule expressed by the Guidelines pertaining to sexual harassment by non-supervisory co-workers has been uniformly applied by the courts. It is not a controversial area; results in each case simply depend on an interpretation of the facts: whether the employer had sufficient notice, investigated properly, disciplined offenders, and so forth. See 3 Larson, Employment Discrimination §46.07 [4] [a] (2d ed. 1995) and authorities cited therein.[8] The rule pertaining to non-employ-

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[8] The Guidelines did not introduce this liability standard into the Title VII context. Prior to the EEOC's enactment of the Guidelines, lower courts had recognized that an employer may be liable under Title VII if it knowingly failed to remedy a discriminatory work atmosphere caused by the acts of co-workers. *See, e.g. DeGrace v. Rumsfeld,* 614 F.2d 796, 803-05 (1st Cir. 1980) (employer may be liable for allowing racial harassment by coworkers); *Higgens v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978) (Title VII violation requires showing that employer was aware or should have been aware of discriminatory work environment), *E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F.Supp. 381, 386 (D.Minn. 1980) ("If management knows or should know of incidents of racial harassment that are more than sporadic, it has a responsibility to take reasonable affirmative steps to eliminate such incidents".); *Friend v. Leidinger,* 446 F.Supp. 361, 383-84 (E.D.Va. 1977) ("Only if the employer knows or should have known of the condition and permits it to continue without attempting to discourage it, may it be found liable."), *judgment aff'd,* 588 F.2d 61 (4th Cir. 1978); *Bell v. St. Regis Paper Co., Container Division,* 425 F.Supp. 1126, 1137 (N.D.Ohio 1976) (employer may be liable for acts of harassment by employees "merely by condoning them.").

ees, while involving fewer cases, appears equally uncontroversial. *Id.* § 46.07[4][b]

In summing up the post-EEOC Guidelines jurisprudence, the Court in *Meritor* stated:

> Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):
>
> > "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Meritor, 477 U.S. at 66 (additional authorities omitted). By the same token, the Court in *Franklin* evidently recognized that sexual harassment which creates a hostile or offensive educational environment for members of one sex is every bit the arbitrary barrier to sexual equality in the educational environment that racial harassment is to racial equality. Surely, a requirement that a male or female junior high school student run a gauntlet of sexual abuse in return for the privilege of receiving an education can be as demeaning and disconcerting as the harshest of racial epithets. Indeed, although the Supreme Court has not yet been presented with a "goose" case, it is difficult to imagine that it would not

conclude that the knowing failure to curb student on student sexual harassment is actionable after holding that a knowing failure to eliminate teacher-student sexual harassment is grounds for a Title IX damage suit.

The Supreme Court was not entirely clear, however, about what it meant in *Franklin* when it said that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See [Pennhurst State School and Hospital v. Halderinan,* 451 U.S.] at 17, 101 S. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Franklin,* 503 U.S. at 75. The trouble is that the passage in *Pennhurst* cited by the Court does not speak expressly in terms of "unintentional violations" or "intentional discrimination." In *Pennhurst,* the Court was presented with the issue of whether Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. § 6010) created in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. After concluding that the Act was enacted solely pursuant to the Spending Clause, the Court reasoned:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on wheth-

> er the State *voluntarily* and *knowingly* accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (emphasis added)

Because *Franklin* itself clearly holds that Title IX satisfies the *Pennhurst* notice requirement in placing a duty on school boards to counteract known hostile environment sexual harassment of students, so that the school board voluntarily and knowingly accepted the terms of the "contract," and that a board's failure to perform its duty is an "intentional" violation of Title IX, it is difficult to decipher exactly what the Court meant by the *Pennhurst* passage. Perhaps the *Franklin* Court's discussion of *Pennhurst* was only intended to put Congress and other concerned parties on notice that statutes which do not speak as clearly as Title IX in proclaiming that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" might not be construed so as to afford a private right of action for their enforcement. Alternatively, the Court's expression may have been intended to limit the right of action under Title IX based on hostile environment sexual harassment claims to the situation in which the federal funds recipient has actual knowledge, or perhaps constructive notice

(which is its legal equivalent), and fails to take appropriate corrective action, rather than in every situation in which the recipient "should have known," in the ordinary negligence sense, of the sexual harassment.

In any event, it is clear from the plaintiffs' allegations and filings in opposition to the motion for summary judgment that they have stated a claim under Title IX because the facts adduced, viewed most favorably to them, show that the school board had actual knowledge that the plaintiffs were being subjected to sexual harassment and abuse sufficiently severe and pervasive as to create for them a hostile and offensive educational environment, and that the board failed to take appropriate corrective action. Indeed, it would appear that the school board in the case at bar was given as much, if not more, knowledge and notice of the ongoing sexual harassment of the plaintiffs as was given the school board in the *Franklin* case. When a male student or even a stranger sexually harasses a female student within the school environment under the board's control, he discriminates on the basis of sex just as much as did the teacher in the *Franklin* case. Although the Court did not spell out the analogy to *Meritor* fully by stating that the school board's failure to take corrective action after gaining actual knowledge of the sexual harassment, this meaning is implicit from the Court's citation of *Meritor*. The Supreme Court reversed the court of appeals' affirmance of the district court's dismissal of Franklin's complaint and remanded the case for further proceedings. This court should therefore reverse the district court's summary judgment against the plaintiffs and remand this case for trial or further proceedings.

Apparently underlying the majority's conclusion that summary judgment is appropriate here is the incorrect assumption that, in general, school boards have no duty with respect to students' safety and no power of discipline to

control educationally pernicious student conduct. *See* slip. op. at 12-13. Even if the school board had not accepted federal funds, however, it owes a much higher duty to its students and has far greater powers of control over them than that described in the majority opinion. In *Vernonia School District 47J v. Acton*, ___ U.S. ___, 115 5. Ct. 2386 (1995), the Supreme Court held that a school board may require all participants in high school athletic programs to submit to urinanalysis tests for drugs regardless of whether any grounds existed to suspect a particular athlete. As partial justification for granting the board this much disciplinary power over students, the court concluded that while the state does not owe a student the same constitutional duty of protection that it owes a prisoner in its full time custody, the student is nevertheless within the temporary custody of the state while in public school and the state also has a tutelary duty to promote and inculcate good morals, health and self discipline among its students.[9] The Court observed that its earlier decision in *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985)

> did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.

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[9] For reasons that are certainly inscrutable to me, the majority interprets my advertance to *Acton* to constitute the "novel" and "erroneous" suggestion that a student is an agent of the school in order to fit within the majority's conflation of agency and tort principles. *See infra at 11-12, n. 9.* As should be clear from the discussion of *Acton* in the text of my dissent, I have referred to that case merely to point out that the Supreme Court has recognized that schools maintain a degree of control over school children and that in this context such control is sufficient to apply tort liability for the knowing failure of a school receiving federal funds to act in accordance with its statutory duty to prevent sex discrimination in the school.

> "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." . . . While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a *constitutional* "duty to protect," . . . we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," . . . with the power and indeed the duty to "inculcate the habits and manners of civility," . . . Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," . . . the nature of those rights is what is appropriate for children in schools.

Id., 115 S. Ct. at 2392 (emphasis added). *See also Johnson V. Dallas Independent School Dist.*, 38 F.3d 198, 208 n. 7 (5th Cir. 1994) ("Schools . . . take care of children day after day for years *in public facilities.* Schools may be said to control children's environments to the same or even greater degree than state-sponsored foster care services, which have been held, post-*DeShaney*, to bear affirmative obligations to their client children. * * * That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours."), *cert. denied*, ___ U.S. ___, 115 5. Ct. 1361 (1995).

For all of the foregoing reasons, I cannot agree with my colleagues that the school board's dereliction amounts to nothing more serious in law than the situation in which a bystander witnesses the drowning of a complete stranger.

Unquestionably, because the school board has accepted federal financial assistance, Title IX places upon it a duty to take appropriate measures to protect students from being subjected in the school environment to sexual harassment, abuse and discrimination of which the board has actual knowledge. As Jane and Janet Doe presented evidence sufficient to survive summary judgment that the school board failed to do so here, the district court's judgment should be vacated and the case remanded for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-93-3578
BRYAN INDEPENDENT SCHOOL DISTRICT, SARAH ASHBURN, Superintendent of Bryan ISD, RANDY CAPERTON, Vice-Principal of Sam Rayburn Middle School, SANDRA PETTY, former Vice-Principal of Rayburn Middle School, JAY ANDING, Assistant Director of Transportation, and BOB OWENS, bus driver, and their employees, agents, and all those acting in concert with them or at their direction,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending is the Motion for Summary Judgment of Defendant Bryan Independent School District: ("BISD"), and

Defendants Sarah Ashburn, Sandra Petty, Randy Caperton, Jay Anding, and Bob Owens ("the Individual Defendants") (Document No. 44).[1] After having considered the summary judgment evidence, arguments, and authorities submitted by counsel, as well as the Amicus Brief submitted by the Texas Association of School Boards, *et al.*, the Court is of the opinion that Defendants' Motion for Summary Judgment should be GRANTED.

I. Background

Plaintiff Debra Rowinsky brings this action for herself and as next friend, on behalf of her minor daughters, "Jane Doe" and "Janet Doe," asserting that Janet was sexually harassed at Sam Rayburn Middle School ("the School"), a public school owned and operated by BISD, and that Jane and Janet also were sexually harassed by other school children while riding the BISD school bus to the School. Plaintiffs have produced competent summary judgment evidence demonstrating the following:

Beginning in September 1992, a male student, G.S., physically and verbally abused Jane and Janet on the bus. Bob owens, the bus driver, did not immediately respond to the girls' complaints, but later assured Mrs. Rowinsky that he would put a stop to the behavior. On September 24, 1992, however, while riding the bus G.S. grabbed Jane in her genital area, and, a few minutes later, grabbed her breasts. Upon informing Randy Caperton, the Vice-Principal of the

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[1] Also pending are the Motion for Leave to File Briefs in Excess of the Court's Page Limit of Defendant BISD (Document No. 43), the Motion for Leave to File Brief as Amici Curiae of the Texas Association of School Boards, *et al.* (Document No. 55), and the Motion for Leave to File Amicus Brief Exceeding Twenty Pages of the Texas Association of School Boards, *et al.* (Document No. 56).
These three motions are GRANTED.

School, of this misconduct, Caperton suspended G.S. from riding the bus for three days and required G.S. to sit on the front seat thereafter. Despite this action, during a period of time in late November, 1992, G.S., with Owens nearby, called the girls offensive names and slapped Janet's buttocks. The girls did not complain to Owens about this misbehavior.

On the afternoon of December 16, 1992, another male student on the bus, L.H., reached up Jane's skirt, touched her near her panty line, and then made a crude remark about what he almost touched. Jane did not tell Owens about this incident. In "December 1992," L.H. reached up Janet's skirt, made the same comment, and then actually grabbed her genital area. Janet told Owens of this misconduct, but he "just stared into space." As a result of this misbehavior, L.H. was suspended for three days. L.H. is not alleged to have further harassed or abused the girls.

On December 18, 1992, Jay Anding, the Assistant Director of Transportation for BISD, assured Mrs. Rowinsky that he would investigate the alleged problems on the bus and take action, On January 14, 1993, after reviewing videotapes from the bus, Anding's assistant, C.W. Henry, assigned a new driver to the bus. G.S. is not alleged to have further harassed or abused the girls.

On March 30, 1993, during a class at the School, a third male student, F.F., reached under Janet's shirt and unfastened her bra. The teacher in the classroom sent both students to Vice-Principal Sandra Petty's office. Ms. Petty sent Janet back to class and suspended F.F. for the rest of the day and the next day. F.F. is not alleged to have further harassed or abused the girls.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution, and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) and implementing regulations (34 C.

F.R. § 106). As noted in this Court's Order entered March 31, 1994, Plaintiffs' claims under § 1983 are properly made against the individual Defendants only in their individual capacities. Plaintiffs' claims against the individual Defendants under Title IX have been dismissed.

II. Discussion

A. The Summary Judgment Standard

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Willis v. Roche Biomedical Lab., Inc., 21 F.3d 1368, 1371 (5th Cir. 1994).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. Celotex, 106 S. Ct. at 2553-54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986). Unsubstantiated or conclusory assertions that a fact issue

exists will not suffice. *See* Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993); Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." Krim, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 688 (1994), citing Matsushita, 106 S. Ct. at 1351. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." Id., *citing* Anderson, 106 S. Ct. at 2511.

B. Plaintiffs' § 1983 Substantive Due Process Claim

An individual may bring suit against a person who, under color of state law, has deprived him of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Plaintiffs allege that Defendants' insufficient action in response to Jane's and Janet's complaints of sexual harassment by the boys facilitated continuing abuse, thus depriving the girls of their substantive due process right to bodily integrity. While it is undisputed that the alleged harassers were private actors, Plaintiffs further assert that BISD and its officials owed a duty to protect the girls as a result of a "special relationship"

created by the Texas compulsory education laws.[2] Defendants' Motion for Summary Judgment contends that the Defendants owed Jane and Janet no affirmative constitutional duty to protect them from harassment from other students, that the individual Defendants are entitled to qualified immunity, and that Plaintiffs have failed to raise so much as a fact issue indicating that the Defendants were deliberately indifferent to the girls' constitutional rights.

In general, "a state's failure to protect an individual from private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dept. of Social Services, 109 S. Ct. 998, 1004 (1989). An affirmative obligation of care and protection can arise, however, when the state "takes a person into its custody and holds him there against his will." Id. at 1005-06. Thus, inmates in prisons are in a "special relationship" with prison officials and are owed that duty of care and protection. Every circuit Court of Appeals to consider the application of that rule to a case such as this, however, has rejected the argument that compulsory day school attendance laws create a "special relationship" that gives rise to an affirmative obligation to protect a student from a private actor's conduct. *See* D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1369-73 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990); Dorothy J. v. Little Rock School Dist., 7 F.3d 729, 732 (8th Cir. 1992); Maldonado v. Josey, 975 F.2d 727, 730-33 (10th

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[2] With a few exceptions (most notably for children attending private or parochial school), Texas law mandates that children between the ages of six and seventeen attend the public school in the district of their residence. Tex. Educ. Code Ann. §§ 21.032-33 (Vernon 1987 & Supp. 1994).

Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993). The Honorable Norman Black, Chief Judge of this Court, also has held that no such "special relationship" exists between Texas public school officials and students who return to their homes each day. Esmeralda v. Partin, 864 F. Supp. 626 (S.D. Tex. 1994).

The Fifth Circuit at least on two occasions has found it unnecessary to decide whether a "special relationship" exists by reason of Texas's compulsory school law. Johnson v. Dallas Ind. School Dist., 38 F.3d 198, 203 & n.7 (5th Cir. 1994); Leffall v. Dallas Ind. School Dist., 28 F.3d 521, 529 (5th Cir. 1994). The Court has noted, however, that the "argument against holding that public schools have 'custody,' at least for some purposes of protecting their physical well-being, appears to derive less from logic than from a pragmatic desire to limit their legal liability." Johnson, 38 F.3d at 203 n.7. The author of the Johnson opinion, Judge Edith H. Jones, ended the referenced footnote, however, with a reiteration of her own "reticence to expand the scope of constitutional claims." Id.

This Court is bound to respect the circuit caselaw. The uniform holdings of four circuit courts and the prior holding of this Court, by its Chief Judge, are controlling. Moreover, the respected views of Judge Jones for the Fifth Circuit suggest that even if a different analysis is made, the likelihood of expanding the scope of constitutional claims to embrace claims of the nature of this case, even when viewing the evidence in the light most favorable to Plaintiffs, is most improbable.[3] After all, the *rejected* claim in Johnson arose

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[3] The summary judgment proof in this case -- largely of adolescent school kids engaging in vulgar and indecent conduct while riding the school bus, and a possibility that the District, which did punish the offenders, meted out insufficient punishment to deter further juvenile

out of the murder of a school child by a non-student, who carried a concealed handgun, rode on the school bus, and entered the school without a student ID badge, where he then shot a student in the head with a stray bullet. In this case, to be sure, the boys' alleged conduct in sexually harassing the girls on the school bus, if true, was vulgar and thoroughly reprehensible. But at least no life was lost or threatened, and all else rather pales when contrasted with the enormous tragedy that occurred in Johnson. The Court therefore concludes that there is no "special relationship" giving rise to a duty of constitutional dimensions that Defendants in this case must protect the girls from the boys' sexual harassment. Moreover, even if the compulsory school laws do create a "special relationship" for the purpose of protecting the children's well-being in certain limited circumstances, under the summary judgment evidence here, viewed in the light most favorable to Plaintiffs, no fact issue has been raised on the assertion that Defendants in this case violated Plaintiffs' constitutional rights. The individual Defendants have also correctly contended that in any event they are entitled to judgment based on their qualified immunity. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738 (1982). The great weight of authority has held that public school students do not have a constitutional right to be protected from private actors, as observed above. No contrary rule for the public day school setting has been adopted by the Fifth Circuit. It therefore would be objectively unreasonable to conclude that in not

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misconduct of the same sort -- is simply insufficient to implicate "the 'fundamental rights implicit in the concept of ordered liberty' and 'deeply rooted in this nation's history and tradition' under the Due Process Clause." Doe v. Taylor Ind. School Dist., 15 F.3d 443 (5th Cir. 1994), *quoting* Griffith v. Johnston, 899 F.2d 1427, 1435 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

protecting Jane and Janet from sexual harassment by other students, the individual Defendants (in 1992-93) knew or should have known that they were violating the girls' clearly established constitutional rights. *See* Doe v. Taylor Ind. School Dist., 15 F.3d 443, 455 (5th Cir. 1994) (constitutional right clearly established only if apparent in pre-existing law). *See also* Spivey v. Elliott, 29 F.3d 1522, 1527 (11th Cir. 1994) ("The right must be particularized so that potential defendants are on notice that conduct in violation of that right is unlawful.").[4]

C. Plaintiffs' Title IX Claim

Plaintiffs also allege that BISD discriminated against Jane and Janet on account of their sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which provides:

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[4] Furthermore, Plaintiffs' cite no Texas law or School rule *requiring* the use of BISD-provided transportation. Thus, even if the compulsory day school law under certain circumstances created a "special relationship," the *absence* of any legal compulsion requiring students to ride the school bus would likewise suggest the absence of any "special relationship" when one voluntarily chose that means of transportation. *See* Black by Black v. Indiana Area School Dist., 985 F.2d 707, 714 (3d Cir. 1991) ("Neither the state compulsory attendance law nor any other state rule required [plaintiffs'] presence on the [] school bus."). *See also* Leffall, 28 F.3d 521 (no special relationship because no state compulsion for student to attend after-school dance).

Under this analysis, the case involves only one alleged act of sexual harassment on the school premises, namely, F.F.'s unfastening of Janet's bra. F.F.'s misconduct was punished with a one and one-half day suspension and F.F. is not alleged to have harmed Janet again. Because the misconduct was punished, evidently to good effect, Plaintiffs' have not so much as raised a fact issue that Defendants were deliberately indifferent to Janet's constitutional rights--a material element of Plaintiffs' cause of action. *See* Gonzalez v. Ysleta Ind. School Dist., 996 F.2d 745, 760 (5th Cir. 1993).

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Defendants' Motion for Summary Judgment contends that Plaintiffs have failed to raise so much as a fact issue that BISD intentionally discriminated on the basis of sex.

To recover damages, Plaintiffs must establish that BISD "intentionally discriminated against the plaintiff student[s] on the basis of sex." Doe v. Petaluma City School Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993). It is not enough that BISD knew or should have known about sexual harassment at the School or did not effectively deal with such complaints. Id.

Plaintiffs assert that BISD failed to respond effectively to claims of sexual harassment *because* of a District policy of intentional sex discrimination. No proof has been offered that BISD's School Board ever adopted any resolution or took any other action formally to adopt or implement such a policy. Plaintiffs instead support their claim by pointing to the following: (1) while the BISD policy handbook describes expulsion or special off-campus placement as proper punishment for students who assault others, neither G.S. nor L.H. nor F.F. were expelled or given special off-campus placement for their alleged assaults on Jane and Janet; (2) G.S. continued to harass the girls after serving his suspension; (3) BISD had a practice or policy of punishing sexual misconduct less severely than fighting;[5] and (4) BISD failed to adhere to federal government regulations under Title IX,

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[5] The summary judgment evidence indicates that students who fought were typically given at-home suspensions, while those who engaged in sexual misconduct were given in-school suspensions.

and failed to train its personnel properly to respond to claims of sexual harassment.

As for the first claim, while the BISD policy handbook does describe expulsion or special off-campus placement as proper punishment for students who assault others, the summary judgment evidence includes over 100 examples of boys and girls who fought or otherwise assaulted other boys and girls, but, like the boys accused of assaulting Jane and Janet, were not expelled or given special off-campus placement. In other words, whatever disparities may have existed in the policy for punishment of different kinds of offenses, or in the applications of those policies, the uncontroverted summary judgment fails to establish a fact issue that any distinction was made by the District based on the sex of the victims.

Second, while G.S.'s misconduct is alleged to have resumed after his suspension, Jane admits in her affidavit that the girls did not immediately inform the bus driver of this new misbehavior, and no allegation is made that G.S. harassed either of the girls after BISD, when it received new complaints, assigned a new driver to the bus. Furthermore, there is no allegation or summary judgment evidence in the record that L.H. or F.F., after they were punished, harmed Jane or Janet again.

Third, the summary judgment evidence indicates that, unlike fighting, much of the reported incidents of student misbehavior identified as "sexual misconduct" involved no physical contact (e.g., namecalling, indecent language, distributing indecent pictures), or only minor physical contact (e.g., poking, flicking, swatting). Plaintiffs do not contend and the summary judgment evidence does not demonstrate that similar conduct was treated dissimilarly based on the victim's sex. In fact, two of the boys accused of abusing Jane and Janet were punished much like students who fought-

-with short at-home suspensions accompanied by parental notification.

Fourth, any failure to train BISD personnel properly to respond to allegations of sexual harassment or failure properly to create or administer Title IX grievance procedures would harm all victims of such harassment, male and female, and thus raises no fact issue on the claim of intentional discrimination based on sex. *See* Seamons v. Snow, 864 F. Supp. 1111, 1117 (D. Utah 1994) ("Defendants' failure to adopt a [sex discrimination] policy or designate coordinators affects males and females equally, and therefore as a matter of law cannot show an intent to discriminate on the basis of sex.").

Finally, what Plaintiffs have not alleged or shown in the summary judgment evidence is any proof that the District dealt less severely with sexual harassment and misconduct directed toward girls than it did with sexual harassment and misconduct directed toward boys.

Accordingly, the Court concludes that the summary judgment evidence, viewed in the light most favorable to Plaintiffs, fails to raise a fact issue that BISD discriminated against Jane and Janet on account of their sex. There is simply no evidence of any intentional sex discrimination by BISD.

D. Plaintiffs' § 1983 Equal Protection and Procedural Due Process Claims

Plaintiffs also assert claims against Defendants under § 1983 for depriving them of their "right to due process by failing to adhere to the specific procedural safeguards provided by the [federal statute].'" Additionally, Plaintiffs seek redress under § 1983 on the claim that "Defendants' actions and/or inactions discriminated against Jane and Janet Doe on the basis of sex, and deprived them of their right to equal protection, as guaranteed by the Fourteenth Amendment

to the United States Constitution." Defendants respond in their Motion that both claims are subsumed by Plaintiffs' Title IX claim.

Indeed, when "the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewage Authority v. Nat'l Sea Clammers Assoc., 101 S. Ct. 2615, 2626 (1981). An examination of Title IX reveals a comprehensive scheme for administrative and regulatory enforcement of its requirements, together with judicial review. *See* 20 U.S.C, §§ 1682, 1683. Moreover, and most significantly, the Supreme Court has held that victims of discrimination are entitled under Title IX to bring private causes of action for prohibited discrimination. Cannon v. University of Chicago, 99 S. Ct. 1946 (1979). This private remedy for individual victims of Title IX violations is implied in the statute, held the Court, "[n]ot only [by] the words and history of Title IX, but also [by] its subject matter and underlying purposes . . . ." Id. at 1964.[6] Moreover, one bringing a private right of action for enforcement of Title IX also has a damages remedy available. Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992). Accordingly, in view of the comprehensive enforcement scheme of Title IX, Plaintiffs' Title IX related equal protection and procedural due process claims are subsumed by the Act, and therefore may not separately be maintained as claims under § 1983.

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[6] The Court also held that there is no inconsistency between this private remedy and the public remedy of enforcement by the Department of Health, Education, and Welfare. In fact, observed the Court, HEW had taken the "unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes," a position that the Court held was "unquestionably correct." Cannon, 99 S. Ct. at 1962-63.

See Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168, 176 (3d Cir. 1993) *cert. denied*, 114 S. Ct. 689 (1993); Mabry v. State Bd. for Community Colleges, 597 F. Supp. 1235, 1239 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 148 (1987); Ruh v. Samerjan, 816 F. Supp. 1326, 1331-32 (E.D. Wis. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994).

Moreover, BISD is only obligated under the Title IX federal regulations to hear complaints alleging actions prohibited by Title IX.[7] Title IX does not prohibit student-on-student sexual harassment because "[t]he sexually harassing behavior of a fellow [student] is not part of a school program or activity." Aurelia D. v. Monroe County Bd. of Education, 862 F. Supp. 363, 367 (M.D. Ga. 1994). While Petaluma, 830 F. Supp. at 1576 & n.14, indicates that Title IX prohibits a school district from failing to respond effectively to claims of sexual harassment in order to discriminate against girls, Plaintiffs have not so much as raised a fact issue on this claim.[8] Therefore, even if Plaintiffs were permitted to assert under § 1983 their denial of due process and equal protection claims premised on BISD's alleged failure to have complied with Title IX's procedural regulations, Plaintiffs have failed in their summary judgment proof to demonstrate any injury to themselves resulting from such failure, and therefore have no claim for damages. *See* Reimer v. Smith, 663 F.2d 1316, 1322 n.4 (5th Cir. 1981) ("It is axiomatic that a plaintiff cannot succeed in

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[7] *See* 34 C.F.R. § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

[8] Nor do Plaintiffs claim that this is the grievance that BISD denied them access to assert.

a § 1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property.").[9]

[9] While Plaintiffs also pray for injunctive relief, Plaintiffs have not pled facts or submitted summary judgment evidence demonstrating any possible future injury to Plaintiffs. To the contrary, it is undisputed that Jane and Janet no longer attend school in BISD. *See* O'Shea v. Littleton, 94 S. Ct. 669, 676 (1974) (past exposure to illegal conduct does not in itself warrant injunctive relief if unaccompanied by continuing, present, adverse effects).

APPENDIX C

[TITLE IX OF EDUCATION AMENDMENTS OF 1972]
UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 38--DISCRIMINATION BASED
ON SEX OR BLINDNESS

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except. . . .

CODE OF FEDERAL REGULATIONS
TITLE 34--EDUCATION
SUBTITLE B--REGULATIONS OF THE OFFICES OF
THE DEPARTMENT OF EDUCATION
CHAPTER I--OFFICE FOR CIVIL RIGHTS,
DEPARTMENT OF EDUCATION
PART 106--NONDISCRIMINATION ON THE BASIS OF
SEX IN EDUCATION PROGRAMS AND ACTIVITIES
RECEIVING OR BENEFITING FROM FEDERAL
FINANCIAL ASSISTANCE
SUBPART A--INTRODUCTION

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

§ 106.9 Dissemination of policy.

(a) Notification of policy.

(1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto. . . .

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) Publications.

(1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each

announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.